

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

74-2522

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To be argued by
WILLIAM I. ARONWALD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2522

UNITED STATES OF AMERICA,

Appellant,

—v.—

IRVING STERN,

Defendant-Appellee.

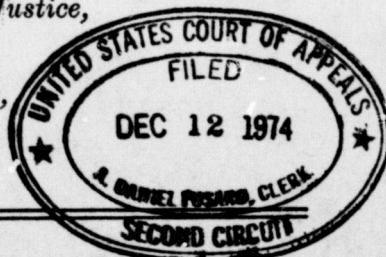
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF AND APPENDIX FOR THE UNITED STATES
OF AMERICA**

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

WILLIAM I. ARONWALD,
*Special Attorney,
United States Department of Justice,*

JOHN D. GORDAN, III,
*Assistant United States Attorney,
Of Counsel.*



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—v.—

IRVING STERN,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The United States of America appeals * from an Order entered on November 19, 1974, in the Southern District of New York, by the Honorable Thomas P. Griesa, United States District Judge, granting in part, after a two day evidentiary hearing, a motion to suppress evidence by Irving Stern.

Indictment 74 Cr. 287, filed March 21, 1974 charged Irving Stern, Nicholas Abondolo and Moe Fliss in twenty-one counts with violations of the Racketeer Influenced Corrupt Organizations Act (Title 18, United States Code, Sections 1962(c) and (d) the Taft-Hartley Act (Title 29, United States Code, Section 186(a) and (b)), and the Internal Revenue Code (Title 26, United States Code, Sec-

* This Court has jurisdiction to hear the appeal under 18 U.S.C. § 3731.

tions 7201 and 7206(1)). Indictment 74 Cr. 1049, filed November 7, 1974, charged Irving Stern, Nicholas Abondolo and Moe Fliss in four counts with violations of the Racketeer Influenced Corrupt Organizations Act (Title 18, United States Code, Sections 1962(c) and (d)) and the Taft-Hartley Act (Title 29, United States Code, Sections 186(a) and (b)) and charged Irving Stern with violations of the Internal Revenue Code (Title 26, United States Code, Section 7201). A motion by the Government to consolidate both cases for trial is pending in the United States District Court for the Southern District of New York.

Introduction

On August 27, 1974, Irving Stern filed a motion to suppress (Rule 41(e), Federal Rules of Criminal Procedure) a tape recorded conversation on May 18, 1973, between himself and one Walter Bodenstein, on the ground that the conversation was privileged because of an attorney-client relationship between Stern and Bodenstein. After an evidentiary hearing on November 18th and November 19th, 1974, Judge Griesa suppressed, as protected by the attorney-client privilege, the statements contained on pages three through twelve of the transcript of the tape recording, in part relating to Stern's inability to explain his acquisition of municipal bonds, which the Government will seek to prove were purchased by him with the proceeds of the criminal activity charged in the indictments.

Statement of Facts

The most significant evidence of the nature of the conversation between Bodenstein and Stern was their conversation of May 18, 1973, the tape recording of which was played for Judge Griesa. Bodenstein and Stern also testified before Judge Griesa.

(a) Walter Bodenstein

Bodenstein testified that he is an attorney, admitted to practice in New York in 1960, who does not have a special field of practice. Since 1970, Bodenstein has derived 50% of his income from his operation of C. P. Sales, Inc., a company performing meat merchandising services for Iowa Beef Processors ("IBP"), the largest meat packing company in the United States (Tr. 25-27, 81-84).*

In March, 1973, Bodenstein, his father-in-law Moe Steinman ** and Sol Steinman, the brother of Moe Steinman, were indicted (73 Cr. 216) in the Southern District of New York for filing false and fraudulent employers tax returns. A second indictment (73 Cr. 215) for different offenses was returned the same day against Moe Steinman, Currier Holman and C. P. Sales, Inc.*** (Tr. 27-28, 96-97, 137-140). In August, 1973 Bodenstein agreed to cooperate with Federal authorities in return for dismissal of the indictment against him (Tr. 28-31, 33-36). In October, 1973, Bodenstein turned the tape of his May 18, 1973 meeting with Stern over to the Government (Tr. 48).

Bodenstein was first introduced to Irving Stern by Moe Steinman eight to ten years ago. He has never represented Irving Stern in any legal proceeding, has never acted as his attorney in connection with any matter, has never billed Stern for any legal services or received any money from Stern for legal services, and has never maintained files

* "Tr." refers to the minutes of the suppression hearing.

** Moe Steinman is identified in Indictment 74 Cr. 287 as the person through whom the bribes alleged in Count One were paid to the defendants, including Stern.

*** Indictment against C.P. Sales, Inc., IBP, Courier Holman, and Moe Steinman have also been filed in the New York State Supreme Court.

relating to Stern as he would if Stern were a client (Tr. 89-92, 94).*

Prior to the filing of the March, 1973 indictments there had been publicity regarding an investigation of Moe Steinman, Bodenstein's father-in-law. Stern, both prior and subsequent to the March, 1973 indictments, visited Bodenstein to find out the status of the investigation and what various witnesses might be saying (Tr. 97). At one of these meetings at Bodenstein's office in early May, 1973, Stern expressed concern about an Internal Revenue Service audit he was the subject of, adding that he was afraid that his unexplainable ownership of certain bonds worth \$110,000, about which he gave Bodenstein detail,** might make it appear that he had received the money for these bonds from IBP. Stern also stated that he wanted to steer clear of Moe Steinman and therefore wanted to discuss this bond problem with Bodenstein, although Stern intended that Bodenstein tell Moe Steinman what he was being told by Stern. During these meetings, Stern suggested that since it might be inferred that the bonds were tied to IBP, the solution to the problem of explaining where the bonds had come from would have to be worked out by Bodenstein as well as Stern (Tr. 46-47, 52, 77-78, 97-100, 119-120). Although Bodenstein had been assured by both Moe Steinman and Stern that the money Stern had used to purchase the bonds had not come from IBP,

"During my prior meetings with Mr. Stern I was left with the impression that the problem was my

* During the time Bodenstein has known Stern he has spoken to him about legal matters on only two occasions. Bodenstein met Stern while representing a wholesale grocer in a dispute with the Meat Cutters Union, of which Stern is Director of Organization. In 1970, Stern approached Bodenstein on behalf of the Union to inquire about a group legal services plan Bodenstein had handled for another union (Tr. 92-94, 156-158, 191).

** The extent of these details is reflected in the transcript of the May 18, 1973 conversation (Tr. 54).

problem as well as Mr. Stern's problems as to these funds that could not be explained . . . I was concerned that at some future date for whatever reasons Mr. Stern might decide to change his testimony . . . and I wished to have a . . . permanent record of the fact that there were no payoffs to Mr. Stern by myself or by my father-in-law relative to Iowa Beef . . ." (Tr. 106).

Bodenstein decided, upon the advice of his lawyer, to tape record his next conversation with Stern, which occurred on May 18, 1973 (Tr. 100-101, 105-107, 114-115).*

Stern's purpose in meeting with Bodenstein, whom he viewed as Steinman's surrogate, on May 18, 1973, was to find out additional information regarding the status of the investigation and to find an explanation for his ownership of the bonds, whether a fabrication or the truth (Tr. 65, 115-122, 125-127). The May 18, 1973 meeting took place at Bodenstein's home at approximately 6 o'clock in the evening (Tr. 85).

At the outset of the May 18 meeting Stern stated that he wanted to check out the "George George" thing. According to Bodenstein, a few weeks prior to this meeting the New York Daily News had carried an article (GX 4) which reported that George George, an executive officer of a supermarket chain, had appeared before a New York County Grand Jury conducting an investigation to determine whether supermarket officials were buying "labor peace". At the May 18 meeting Stern wanted to determine

* It is conceded that Bodenstein never received permission from Stern to tape record this conversation with him and that he did not advise Stern at the time of the meeting that their conversation was being recorded (Tr. 31-32, 44-45). Bodenstein also testified that he did not record the conversation with knowledge of the Government (Tr. 48, 89-90).

the status of George George's grand jury appearance*, and stated that he had been assured "Nicky"*** was "100%" (Tr. 127-131).

In connection with the March, 1973 indictments Bodenstein and Moe Steinman had retained Louis Bender, Esq., a noted tax specialist, to represent them. During the May 18th meeting, in response to Stern's statement that some business friends had recommended some tax attorneys, Bodenstein informed him that as a result of their own search for an expert in the field of tax law, he and his father-in-law found Mr. Bender to be reputed to be one of the best. Bodenstein, who had been previously informed by Stern that he had retained an attorney and an accountant to represent him, suggested that Stern have his lawyer contact Bender. Stern stated, however, that he had been warned by his lawyer not to talk to anyone, and Bodenstein agreed to present Stern's problem in the form of a hypothetical to Bender and report back to Stern what Bender's thoughts were about meeting with Stern. Since Bodenstein was to meet with Bender on May 21 in connection with his own tax problems and in order to avoid having Stern press him for an explanation for the bonds, Bodenstein offered to talk to Bender about how a meeting between Stern and Bender could be arranged without Stern's attorney knowing about it (Tr. 101-105, 107-113, 116-117, GX 8). According to Bodenstein, it was during the May 18, 1973 meeting that Stern indicated for the first time that he wanted Bodenstein's assistance in securing expert tax counsel (Tr. 58, 105, 118).

* Indictment 74 Cr. 287 alleges that George George was one of the supermarket officials that had delivered monies to co-defendant Nicholas Abondolo.

** Bodenstein testified, as did defendant Stern, that the "Nicky" referred to was co-defendant Abondolo (Tr. 129-130, 237-240).

(b) Irving Stern

Irving Stern is currently the Vice President of the International of the Amalgamated Meat Cutters Union and Director of Organization of Local 342 of the Meat Cutters Union (Tr. 148).

In approximately June, 1972 Walter Bodenstein came to Stern's home and advised him that Bodenstein was under investigation and that some of his employees had been questioned by the authorities about a number of trade union personnel, including Stern. Stern, who assumed that the tax investigation of Bodenstein related to the ongoing investigation into bribery and corruption in unions in the meat industry, told Bodenstein that he would like to be kept informed as to further details of the investigation as they developed (Tr. 152-153, 175-176). At the time of this conversation, Stern knew that Bodenstein was an officer of C. P. Sales, Inc., and that he was running the company* (Tr. 158-159).

Approximately four or five weeks later Stern contacted Bodenstein and inquired whether there had been further mention of his name in connection with the investigation.** Shortly thereafter Stern, while attending a union convention, was advised by a union representative that there Stern's name had been mentioned in connection with an investigation relating to IBP. Upon his return Stern contacted Bodenstein to find out if he had heard that Stern's name had been mentioned in connection with an investiga-

* Stern later testified that he never even heard of C. P. Sales, Inc. until August, 1972 (Tr. 185). He then testified that he first heard of C. P. Sales, Inc. in February or March, 1973 (Tr. 187).

** This was the first of several significant inconsistencies in Stern's testimony, for he later testified that after the June, 1972 meeting with Bodenstein he did not speak to him again until his return from the convention (Tr. 173-180, 219-222).

tion regarding IBP; Bodenstein answered that Stern's name had come up, and that the tax investigation of Bodenstein related to IBP (Tr. 153-155). Stern asked Bodenstein to represent him in connection with the investigation and Bodenstein refused (Tr. 178-180, 223-227). It was at this time that Stern first "tentatively" discussed in a "gingerly fashion" with Bodenstein the fact that he was concerned about the fact that there might be an effort to link his "stock speculations" to the IBP bribery investigation (Tr. 183).

Stern knew at this time that Moe Steinman,* Bodenstein's father-in-law, was a subject of the IBP investigation, which involved the bribery of supermarket officials by Moe Steinman on behalf of IBP, and that Steinman had a number of meat brokerage companies for which Bodenstein was the attorney (Tr. 183, 187-188). It was also Stern's belief in August, 1972 that Bodenstein was the Attorney for IBP (Tr. 185-186). As a result of his concern about the IBP investigation and about the possibility of being tied into it Stern discussed with Bodenstein financial matters relating to what he described as his speculations in the stock market (Tr. 161-163, 180-181). According to Stern, he had first been assured by Bodenstein that since he was an attorney and since Stern was seeking legal advice, everything they discussed would be in strict confidence (Tr. 197-198).

In January, 1973 Stern was subpoenaed by the New York County District Attorney's Office. He went to the office of the District Attorney accompanied by an attorney named Harold Cammer and, after being advised that the investigation related to Moe Steinman, he refused to testify

* Stern had known Steinman for 16-17 years (Tr. 242).

** Stern was unable to explain why he would ask Bodenstein to represent him in connection with an investigation relating to IBP when he thought Bodenstein was IBP's lawyer (Tr. 189-191).

before the New York County Grand Jury. Shortly thereafter he met with Bodenstein and, after advising Bodenstein that he had been to the District Attorney's Office and that one of the District Attorney's representatives had hinted that there was a special relationship between Moe Steinman and Stern, Stern for the second time asked Bodenstein, Steinman's son-in-law, to represent him in connection with the investigation into bribery of union officials in the supermarket industry. Bodenstein again refused and recommended another attorney (Tr. 164-167, 169-172, 224-225).

About March 28, 1973, Stern received a notification from the Internal Revenue Service, dated March 26, that he was being audited. Several days later, during either the first or second week in April, he spoke to Bodenstein about his having received notification of tax audit; Bodenstein recommended another lawyer (Tr. 203-204, 209-211). According to Stern this discussion with Bodenstein occurred prior to his having retained anyone to represent him in connection with the tax audit (Tr. 204-206, 213-214). This testimony was subsequently contradicted by Stern who, upon being shown a power of attorney executed by him on April 2, 1973, notifying the I.R.S. that he had retained his present counsel, Raymond Grunewald, Esq., to represent him in connection with any "tax matter currently under investigation", admitted that at the time he discussed the tax audit with Bodenstein he had retained counsel (Tr. 216-217, GX 5 and 6).

At the time of the May 18, 1973 meeting Stern was aware that Bodenstein had himself been indicted in connection with a tax-related matter. Stern claimed that it was he, not Bodenstein, who brought up the subject of expert tax counsel prior to the May 18th meeting (Tr. 227-229). According to Stern, his purpose in meeting with Bodenstein on May 18, 1973, and disclosing the information he did was to seek Bodenstein's aid in securing expert tax

counsel* in an effort to explain his acquisition of the bonds for which he had no explanation (Tr. 228-230, 248-257). He added that a similar discussion with Bodenstein had occurred the previous week (Tr. 234). Although Stern conceded that he was seeking to negate a bribery charge and thought Mr. Grunewald was a good trial lawyer, "I saw this specifically as a tax problem . . . for example, could I deduct interest which came from municipal bonds . . ." (Tr. 249-250).

**(c) The Taped Conversation (GX 8)
on May 18, 1973**

(1)

Bodenstein	12397	<p>This isn't plugged in so how long can it go? Book says you can do it. Book says you can do it.</p> <p>Yeah, there's a delay. It's like a (noise)</p> <p>Yeah, Yeah, Yup.</p> <p>That's correct. O.K. Buddy</p> <p>Bye Bye</p> <p>Yeah, I get a like a time delay. I can hear myself here.</p> <p>As as I talk it comes in a minute later. You hear it?</p> <p>A couple of seconds after I talk.</p>
Other Voice		<p>Yeah</p>
Bodenstein		<p>This doesn't seem that goddamned sensitive. Walk over there Hy.</p>

* Stern explained that while he had retained and met with Mr. Grunewald on several occasions, he thought it necessary to consult a tax specialist (Tr. 248).

Hy On! Come on you gotta play that
back to me. Well go away and talk
to me
Fair Leigh Dickinson University

Bodenstein Too loud

Hy Fairleigh Dickinson University. Uh
Brooklyn Law School. Bachelor of
laws, uh, today is Friday the 18th.

Bodenstein Alright. Give us a hand and let me do
it the way it would it mean something.
Because I gotta set this son of a bitch
up. Let's see if it works. Almost . . .
(unintelligible)

Hy They, they recommend is sort of . . .
(unintelligible)
One two test

Bodenstein I got it *

Woman's Voice Tell 'em no

Bodenstein So I'm treating

Child's Voice Chicken!

Bodenstein How come?

Child's Voice Daddy.
. . . (unintelligible)

Bodenstein Tell Herb how you're doing
Excuse me

* Bodenstein testified that the preceding portions of the tape recorded a conversation with the seller of the tape recorder about its operation. "I gotta set this son of a bitch up" refers to preparing the recorder to operate (Tr. 84-87).

(2)

Bodenstein	Did you get me cigarettes sweetheart
Woman's Voice	Yes, they're in the front
Bodenstein	Want some?
	Yeah (unintelligible)
	Better go inside Herb
Stern	How do you feel?
Bodenstein	Shot! I was done in I was in Portland. I was looking at a lamb, a lamb packer there.
Stern	Oh
Bodenstein	New
Stern	Nothing . . . (unintelligible)
Bodenstein	All right, I had a after I talked to you last week I was disturbed and I sat down and had a meeting with Moe. I understand your problem and I got the feeling that maybe something was going on that I didn't know. I had a long talk with him and I made him swear on the kids. I had a long talk with him and I told him (unintelli- gible) . . . I never gave you nothing. I says I talked to IRV over IOWA BEEF. I don't believe that you ever gave him any of that.
Stern	Never did.
Bodenstein	Because I don't understand. I was talking of your problem this and that and I got a bad feeling when we talked last week and I thought maybe some- thing was going on that I didn't know

anything about. Is there Irv? I don't know. I'm serious. I'm not bull shitting because I, I sat him down. I got upset because I gave the fucking books to auditors is what I told him, this shit and that shit I don't wanna know, you know if something's there I want to know it. He tells me no. Swore to me on the kids, on everything.

Stern Well, it's true.

Bodenstein O.K.

Stern Didn't I raise it?

Bodenstein Then there's no

Stern Didn't I raise it?

(3)

Bodenstein No, no, in my head that's what was raised and I was concerned about it.

Stern Did you tell him that I said no?

Bodenstein No, I told him you said no. I told him that you said no. I was upset. Uh! Moe's beating the tree with IRS and shit again. Much of whom are bothering the shit out of him.
Let me grab the fucking . . . (unintelligible)

Stern Huh

Bodenstein Other than that we got uh . . . IRS has been visiting everybody. They're now going through TRANSWORLD again apparently, from what MOE tells me—and they're continuing—they're continuing (noise) . . .

Stern (Unintelligible) . . . Absolutely nothing has happened except that I had to go. The only thing I wanted to check out is the GEORGE GEORGE thing, and what we don't know—I didn't know until you told me that you didn't say anything on that there—was a question there but a message was sent back through the same guy who brought it that don't worry about NICKY, NICKY is solid. Nicky'll not . . . NICKY has never done anything improper in his life and that NICKY is 100% solid.

Bodenstein Now, with the bonds—you're talking—the number keeps switching. I don't know where we're at with that.

Stern I don't know . . . (unintelligible) . . . I don't have to switch—go ahead.

Bodenstein You're talking a hundred and ten

Stern Right, it's always been that.

Bodenstein All right now.

Stern There's twenty in sixty-eight. It was twenty in sixty-nine. I'm thinking . . . there's twenty I gave to CHEMICAL as a loan in '68.

Bodenstein O.K.

(4)

Stern That's . . . I have it here I'm trying to keep a record . . . I can . . . I have the numbers I just keep the numbers I got no fucking records. It was, here I don't know which is which now but the point is I gave 20 in 68.

Bodenstein O.K.

Stern I made a loan in AMALGAMATED then I made a loan in '69 to pay taxes in CHEMICAL. Then

Bodenstein Excuse me.

Stern I gave 50 to HIRSCH & COMPANY as collateral against some stock purchases.

Bodenstein Which is 20, 20 is forty and 50 is ninety.

Stern Ninety and then in 71 used another 20 again in the AMALGAMATED and so it's 40 in the AMALGAMATED 20 in CHEMICAL 50 in this. This is it,

Bodenstein Now how about your guy at the bank. Is anybody on him.

Stern No, no we're still trying to get the records from . . . the ones from HIRSCH the ones from HIRSCH, the DUPONT, the SHIELDS. The accountant has, has asked to a letter for the Here I even have the bond I didn't think I

Bodenstein All right.

Stern Has written a letter which I countersigned authorizing them to turn over my records including any collateral that was used because you know if it's there you better know.

Bodenstein Right
Absolutely

Stern There's no fucking around. It's now three weeks and we keep pressuring them and you know how it is in these

fucking things cause DuPont is all fucked up. You know it comes from HIRSCH, HIRSCH is out of business.

Bodenstein

Then there was a merger, another thing a whole cockamamie

Stern

Yeah! Yeah! that's right. First there's a merger between HIRSCH and DU PONT. Then the guy who is in DU PONT moved over to SHIELDS so I transfer my accounts from DU PONT to SHIELDS. So we're trying to it out of DUPONT really is where we're trying to get the records, because that, there was a slip of paper there showed you proof of ownership to

(5)

Stern

follow

Bodenstein

Uh! Uh!

Stern

On that's 50 we're trying to get to see if actually that records still extant or it got lost some place. You know how fucking records, there in warehouse and all that and the account was transferred. We're trying to get the fucking thing 2 to 3 weeks. Hoping next week to 10 days we'll have the fucking records. You see I have my records.

Bodenstein

Uh! Uh!

Stern

Everything I've turned over to the accountant and he's worked it over. But the one major problem is how do you account for this kind of shit. You know where did it come from. Now

this. The major fear is. See my attorney is . . . (unintelligible) I've sworn on a stack of bibles that I absolutely . . . (unintelligible)

Bodenstein

That's true

Stern

It's true. Absolutely nothing to do with IOWA.

Bodenstein

IRV, the way you say that frighten. Is that true?

Stern

Yes it's true.

Bodenstein

Okay Uh, so what we've got to do. You've got an exposure with this fucking things . . . (unintelligible)

Stern

And they're going to try to link me up with MOE I'm telling you. And what worries me is that they're going to try to claim Mafia money.

Bodenstein

Uh, which is a lot of horse shit.

Stern

Yeah, of course, lot of horse shit. The question is, is there any place that they can possibly account for any place this could have come from. Some posture got to be worked out, that's the situation.

Bodenstein

All right, let me tell you what I think ought to be done as a first step

Stern

Please, let me ask you

Bodenstein

Go ahead

Stern

Another thing if you don't mind

(6).

Stern Some business friends who've come upon some income tax problems have recommended me by KOSTELANETZ. Uh, uh, give me the other name Vallins

Bodenstein BENDER

Stern NAT BENDER. They didn't give that name Vallins or Jallins

Bodenstein That's your touching on what I was going to suggest

Stern VALLINS. Is there a VALLINS?

Bodenstein He never came to me

Stern A very prominent name
Give me a very prominent

Bodenstein I've got and I'll tell you what we did when we checked. I've got two names from everybody.

Stern RITHOLZ, is that a name

Bodenstein RITHOLZ rings a bell, I don't know why.

Stern Associated with KOSTELANETZ, or somebody.

Bodenstein Could be. Here's what I get. I get KOSTELANETZ, as number one, BENDER number two or BENDER number one, KOSTELANETZ number two. All right.

Stern Another name, BOKEY

Stern I should have brought it

Bodenstein All right so it's number three. Unimportant. Why don't you have your lawyer get in touch with BENDER. Let him just talk it out that way.

Stern Oh, he got this accountant doing the analysis

Bodenstein BENDER's got a good head. He's the best in the business. Maybe KOSTELANETZ is better you know, who you talk to, All right? MERCHA KAPERA, you know.

Stern How does he come to him and what is the relationship. You know

Bodenstein All right.

(7)

Stern This is the problem
You want to, to help me.

Bodenstein Let me talk you know
IRV Uh! Let me talk to

Stern One other thing, the lawyers have warned me keep my fucking mouth shut.

Bodenstein Okay! Let me talk, let me talk to BENDER

Stern . . . Keep my fucking mouth shut . . . what they're concerned about that I maybe shooting my mouth off too much.

Bodenstein A lot of people, well don't. Uh, you know, you've got to listen to their advice. Let me do the following. I have a Monday morning meeting with

BENDER. Okay 9:30 in my office. Ah, let me just ask him in what proper way the meeting can take place and . . .

Stern

If it should.

Bodenstein

Or if it shown even and

Stern

The one thing I don't want to link is my situation with MOE and IOWA BEEF, you know for obvious reasons. It doesn't matter that it's not true. The reason I . . . (unintelligible) . . . offer down on me is that they thought of this guy . . . (unintelligible) . . . taking care of . . . (unintelligible) . . . the reason I went this route is because I am most . . . I dreadfully afraid of the whole cockabob. They're trying to do it, they're trying to do it, they're trying to do it with AARON. They're trying to push that IOWA BEEF somehow. They're trying to make a fucking case that you know, this buyers and things I am so fucking afraid, not only for myself.

Bodenstein

As far as I know of that situation, IRV. CURRIER's testified I have STAN FELDMAN in my office today, as a matter of fact. Uh, I've spoken to everybody at IOWA BEEF. Everybody has told the truth. The only involvement you've ever had in that situation to my knowledge.

Stern

The STANHOPE

Bodenstein

Is at the meeting and nothing improper. I've gotten that from you.

I've made MOE swear to it. 'Cause I was questioned already if you want to know the goddamned truth. I made MOE swear. I've gotten it from CURRIER. I've gotten it from BOB KEMP, I got it from what the hell, that lawyer?

Stern You saying, in their records, in your records, in all records.

(8)

Bodenstein So somebody wants to make out a lie, Irving. So what the hell can you do.

Stern Well, you know what you can do. You mean do I have to tell you. Somebody wants to make up a lie about AARON. I'm not b...ing . . .

Bodenstein Okay.

Stern Somebody wants to make up a lie, so they make up a lie. So they have a fiction.

Bodenstein All right, let me. Can I call you in your office Monday?

Stern I'll call you

Bodenstein Call me at

Stern . . . (unintelligible) this point it's easier, it's easier.

Bodenstein Call me at 10:30 Monday morning.

Stern I'm going to be at the accountant's at 11 o'clock

Bodenstein Call me at 11 o'clock. I will have LOU BENDER in my office and I'll ask him what the proper way to do it, how to accomplish it and whether or not it poses a problem. You know it is a conflict, is it a shtick, is it this, is it that

Stern What do you mean by that, now, whether my lawyer should contact.

Bodenstein Yeah, how your lawyer should go about doing that.

Stern . . . (unintelligible) I'm afraid of leaking.

Bodenstein Let me . . . I know, in other words

Stern I swore on a stack of bibles . . .

Bodenstein I know what you're saying

Stern That I have nothing to do with you. Matter of fact the IRS guy asks, it's policy, he says that I am MOE STEINMAN's friend.

Bodenstein You are Moe

Stern So I looked, I looked, what the hell is he talking about. And you don't know, which fucking wires are tapped. You don't know, you know, any connections.

(9)

Stern I think most important that we, even though I'm shitting in my pants, but most important, is to keep a separation.

Bodenstein Okay

Stern Keep a separation

Bodenstein Let me talk with LOU and see if

Stern Post the problem of a guy.

Bodenstein Let me pose the problem without mentioning your name and see if it's pro-

per for him to handle it and. Without without a connection that will look bad

Stern But you know the situation

Bodenstein Yes, I do. I know it totally. You know, you've given it to me, I understand it. I will have LOU Monday morning. Let me talk to him. He's the best in the business, in my opinion.

Stern I gotta get, I'll get to you on Monday. You gonne be.

Bodenstein I'll be in all day Monday.

Stern All right. I have your number that's what's the name of the company.

Bodenstein It's either under my name BODEN-STEIN listed under my name 686-5574

Stern When I can't talk to you on the phone, I will come into the city.

Bodenstein I'll meet you, I'll have a drink with you. I'll have some coffee with you.

Stern All right, during the day sometime

Bodenstein Any time at all Monday

Stern All right but you understand you know my posture

Bodenstein Yup.

Stern And my posture is to keep MOE away from me

Bodenstein You what what the same of the god-damned thing . . (unintell)

- Stern I know . . . there are none, you know there are none but they want to prove that and I'm a live one for them. If it doesn't . . . I don't get across to you?
- (10)
- Bodenstein You got across to me completely. I, I just don't know where the hell they're going, IRVING. They're all over the goddam lot.
- Stern That's the problem and if they
- Bodenstein Say, my accountant was told by-um-they threatened him, they threatened DICK GUMSON disbarment this stuff, that stuff. These are guys who who told the truth, have nothing to say and so I don't know what the hell is supposed to happen
- Stern My posture of course is as far as I know that I have, I am taking the Fifth down the line. I have no place to go. I have no place to go.
- Bodenstein All right
- Stern Unless the accountant. Are you with some people?
- Bodenstein No, I got the kids. I usually do, do a Friday night shtick with them for dinner.
- Stern So my posture is unless they tell me something, I don't know what to do, they may try to give a rationale, some bullshit—of inheriting and something. I don't know. I don't know. There's got to be an answer. I just can't have a no answer.

Bodenstein Let me talk to LOU. He's the best
tax lawyer in the business

Stern Well, I'll call you on Monday

Bodenstein How's your wife feeling?

Stern She's all right because I've, I've been
behaving fairly well.

Bodenstein You look much better

Stern I'm behaving fairly well. I mean that
sincerely.

Bodenstein Okay. Good.

Stern Any my motivation, here is, really, if
they hadn't mentioned MOE when they
came in on me, I wouldn't have gotten
upset. But when they start and they
start the sticklers with the links my
fear was, not that they can prove
something, that that on the contrary
they'll make allegations of of hidden
money. That's what's upset me so ter-
ribly. Since I can't explain, they'll
make the allegations. So you say
Okay, it doesn't matter. He's already
in it. Do I have to complicate his
fucking life. Do I want to be party to
anything, that's goint to complicate his
life. That's what I'm saying here.

(11)

Bodenstein Let me get a hold. You have my word
LOU will get a full picture without
names on Monday. If there's a way
where he can handle the situation, he
will.

Stern Even if I meet him off the record and you'll

Bodenstein All right

Stern Straighten him out tonight

Bodenstein You'll pay him

Stern Could you tell me

Bodenstein Whatever. Or if he says you've got to pay him, You'll pay him . . . (unintelligible) A couple of de'lars. Whatever I don't know

Stern Whatever has to be done but I, what I'm most fearful of is that my guys find out anything about it. But they've warned me if you go around talking, man, you're dead.

Bodenstein He may want. Your guy may be better speaking to LOU BENDER than you. I don't know, let me talk to LOU. LOU is respected, he is well known, he is straight as a die.

Stern But I got . . . (unintelligible)

Bodenstein A good reputation

Stern . . . (unintelligible) not to lose my guys I had . . . (unintelligible)

Bodenstein You're not going to lose your guys, you know. They may go on a consulting basis to LOU.

Stern They may not go at all

Bodenstein Well let me see what LOU says and then let me tell you what he says

Stern

Tell him the situation. Since, here's the situation.

Bodenstein

I'll tell him it's sensitive.

Your lawyer feels that you shouldn't. you feel you need some advice possibly and you don't know which way to handle it.

Stern

And I'm much afraid, you know, I'm much afraid of losing the only thing I got.

(12)

Bodenstein

All right

Stern

I got nothing else, I lose them, I'm dead. You know, I don't even have all this because I've told them the whole fucking story in terms of, you know, what this is all about. You know, that over the years . . . (unintelligible) and all this bullshit. If I lose them, where do I turn.

That's way it's got to be posed, and you can do it. You're clever enough to know how to do it. Here's a situation where a guy came to me with a problem I don't know how to advise him. He's concerned about going to somebody because he's been told, you know, he's not to talk, he is not to spread any stuff around and things of that stuff and that he's going to endanger himself and all that but he just doesn't know how to turn and is there a way. What is the answer?

What is the posture of a guy?

Do I have to explain?

Bodenstein I don't know, yeah, I, I think I know the answer as a lawyer Uh

Stern As an attorney you know the answer

Bodenstein But I'm not the pro in this area and LOU BENDER is, let me talk with him

Stern I'll call . . . (unintelligible) don't make any commitments unless I . . . (unintelligible)

Bodenstein I'll make no commitments whatsoever

Stern You know what I'm saying

Bodenstein I will do it very quietly

Stern I'm turning . . . (unintelligible) in desperation for some advise of, cause I'm much afraid of talking and much afraid. The only one I really consulted, that knows the whole god-damned thing, you know, is you. Uh WALTER. I I feel (unintelligible) people . . . (unintelligible)

Bodenstein No, I'm not, uh, let me see what I can do. I hope your wife feels better. You look better. Keep your chin up.

(13)

Bodenstein Come, I'll walk you to the car. Where are you—out front?

Stern . . . Will you be available

Bodenstein I should be available all day Monday.

Stern Should I give my name when I call you . . .

Bodenstein Yeah, . . . (unintelligible) you called me and if it's ever asked what you called me for tell the truth. You called me, you asked me to talk to the best lawyer in the field to get a feeling, which is the truth

Stern . . . (unintelligible) Should I use another name

Bodenstein Ask for me, tell them it's a friend. If you want to do it that way. That's all. They'll put the call through

Stern Okay

Bodenstein That's all

Stern You tell them somebody else is calling

Bodenstein Will do, I'll speak to you

Stern So long, Good Luck

Bodenstein Speak to you Monday and I'll see you

Stern . . . (unintelligible)

(d) The Court's Findings

At the conclusion of the evidentiary hearing the trial court suppressed for use as evidence everything on pages three through twelve of the transcript which relates to defendant Stern's problems concerning his municipal bonds. The Court denied the motion as to those portions of the conversation relating to IBP and George George (Tr. 269, 307). The Court gave the following bases for its decision:

(1) That, although the relationship between Walter Bodenstein and Irving Stern was not clearcut, it might be said to be one of attorney and client and the excluded portion of the transcript therefore privileged (Tr. 261-3, 307-311).

(2) Even assuming their relationship was not one of attorney and client, the May 18th conversation relating to the bonds is privileged on the theory that Bodenstein was being employed by Stern to act as his agent to communicate with Mr. Bender (Tr. 262-3, 307, 310).

(3) That even if Stern's purpose in consulting with Bodenstein and Mr. Bender were to come upon a fabricated explanation for the bonds, that purpose would not destroy the privilege (Tr. 264-265, 294-297). In any event, Judge Griesa was not satisfied that it was certain that this was Stern's purpose (Tr. 264-265, 294-297).

A R G U M E N T

P O I N T I

There was no attorney-client relationship between Stern and Bodenstein.

Any claim of attorney-client privilege must be evaluated in light of the principle that "[t]he investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges." *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961). See also *In re Horowitz*, 482 F.2d 72, 81-82 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973). When Stern's claim of privilege is thus considered, it is clear, we respectfully submit, that Judge Griesa erred in holding that the tape recording of the May 18, 1973 conversation should be suppressed on the grounds of a privilege arising out of an attorney-client relationship between Stern and Bodenstein. While Judge Griesa made no specific findings of fact, it is clear from the record that Stern has not sustained his burden, *In re Bonanno*, 344 F.2d 830, 833 (2d Cir. 1965), of establishing that his conversation with Bodenstein on May 18, 1973, is protected by the attorney-client privilege, for Stern has

made no showing that at the time he was Bodenstein's client or seeking to become his client. See, generally, *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963), quoting *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-359 (D. Mass. 1950). See also *Steiner v. United States*, 134 F.2d 931, 934-935 (5th Cir.), *cert. denied*, 319 U.S. 774 (1943).

At the time of the May 18, 1973, meeting between Stern and Bodenstein, Stern had retained his present counsel, Raymond B. Grunewald, Esq., who had filed a notice of appearance as Stern's counsel six weeks before in the very Internal Revenue Service investigation which Stern now claims he was seeking Bodenstein's advice about. Stern had, by his own admission, asked Bodenstein twice within the previous nine months to represent him in connection with the meat industry investigation of which this tax investigation was a part and had twice been refused by Bodenstein, who had never represented Stern in any capacity or accepted a retainer or fee from Stern. At the time of the May 18th meeting, which took place on a Friday evening at Bodenstein's home, Stern knew that both Bodenstein and his father-in-law, Moe Steinman, had been charged in pending federal indictments arising out of the meat industry investigation, Steinman for having conspired to make payments to supermarket and union officials, among other things.

The notion that Stern had or was seeking to enter an attorney-client relationship with an attorney under indictment in the same investigation, even though Stern had his own lawyer and accountant, is conclusively rebutted by the undisputed evidence that Stern's contacts with Bodenstein were for the purpose of obtaining information from Bodenstein about the pending meat industry investigation in which he, Bodenstein, Steinman and their associates were enmeshed. Cf. *United States v. King*, 335 F. Supp. 523, 545-546 (S.D. Cal. 1971), *aff'd in part and rev'd in part*,

478 F.2d 494 (9th Cir.), *cert. denied as Light v. United States*, 414 U.S. 846 (1973). Moreover, as the testimony at the hearing and the May 18 conversation make clear, Stern was using Bodenstein as a means of communicating with Steinman, who, the indictment charges (See 74 Cr. 287, Count One, Overt Act No. 1), paid Stern \$2,000 per month in bribes from January, 1968 through December, 1971. *Cf. Morgan v. United States*, 380 F.2d 686, 693-694 (9th Cir. 1967), *cert. denied*, 390 U.S. 962 (1968). At the outset of their conversation on May 18 Bodenstein reported that since his last meeting with Stern, he had talked to Steinman, who had sworn he had never given Stern anything in connection with IBP.* During the conversation Stern said, in reference to communicating directly with Steinman:

"And you don't know which fucking wires are tapped. You don't know, you know, any connections. I think most important that we, even though I'm shitting in my pants, but most important, is to keep a separation . . . And my posture is to keep MOE away from me" (GX 8, pp. 8, 9).

But the message he wanted Bodenstein to give Steinman for him was clear:

"My posture of course is as far as I know that I have, I am taking the Fifth down the line. I have no place to go . . .

* * * * *

My motivation, here is, really, if they hadn't mentioned MOE when they came in on me, I wouldn't have gotten upset. But when they start and they start the sticklers with the links my fear was, not that they can prove anything, that that on the contrary they'll make allegations of of hidden money.

* The payments that Stern is charged with having received from Steinman have nothing to do with IBP.

That's what upset me so terribly. Since I can't explain, they'll make the allegations. So you say, Okay, it doesn't matter. He's already in it. Do I have to complicate his fucking life. Do I want to be party to anything, that's going to complicate his life. That's what I'm saying here" (GX 8, p. 10).

To be sure, part of the conversation between Stern and Bodenstein on May 18 related to Stern's consulting an attorney who was a tax expert. However, it was clear that Bodenstein was not then Stern's attorney, Mr. Grunewald having been retained weeks before, and the tax attorneys Stern and Bodenstein discussed did not include Bodenstein, whose familiarity with various prominent tax lawyers came not from his professional activities but from his own need for one in connection with his own investigation and subsequent indictment.

The net of the matter is that, while Bodenstein is a lawyer and some of his conversation with Stern did involve Stern's legal problems with the Government, their conversations were not one of attorney and client but of Stern, an alleged bribe recipient, sharing his problems with and seeking information from Steinman, who is alleged to have paid him, using Steinman's son-in-law Bodenstein as a conduit to keep his distance from Steinman. To dignify such an activity with the protection of the attorney-client privilege is wholly unwarranted:

"... [I]n order to exclude testimony as to communication under the rule relied upon the communications must have their root in the relation or contemplated relation of client and attorney and this fact must be manifest."

United States v. Funk, 84 F. Supp. 967, 968 (E.D. Ky. 1949), *aff'd* as *Prichard v. United States*, 181 F.2d 326 (6th Cir.), *aff'd*, 339 U.S. 974 (1950). In *Funk* the Court rejected the claim of privilege, pointing out in language fully apposite here, that the defendant

" . . . does not claim that it was his purpose to create or establish the relation of attorney and client between them. It is quite clear that no such relationship existed or was contemplated by either of them" (84 F. Supp. at 969).

While Stern's communications with Bodenstein might have been protected if they had been made by Stern with the expectation, unrealized in the event, that he would retain Bodenstein, *Smale v. United States*, 3 F.2d 101 (7th Cir. 1924), *cert. denied*, 267 U.S. 602 (1925), the evidence was undisputed that Stern knew that Bodenstein would not represent him, having twice refused to do so even before the March, 1973 indictments of Steinman and Bodenstein. *Id.* at 102. The statements Stern made to Bodenstein are for this reason alone excluded from the protection of the privilege: ". . . [i]f the client continues his communication after the attorney's refusal to act for him . . . he does not need or deserve the protection of the privilege." VIII Wigmore, Evidence § 2304 at p. 587 (McNaughton rev. 1961) *People v. Hess*, 8 App. Div. 143, 40 N.Y. Supp. 486 (3d Dept. 1896).

Moreover, Bodenstein, even in the discussion of tax law experts, was clearly not ". . . in connection with the communication . . . acting as a lawyer". *Colton v. United States*, *supra*, 306 F.2d at 637. See also *N.L.R.B. v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965); *Olender v. United States*, 210 F.2d 795, 806 (9th Cir. 1954). Rather, he was merely furnishing Stern with the fruits of inquiries he had made as a result of his own investigation and indictment for violations of the tax laws arising out of his own meat business activities.* At the most, Stern's discussions

* The fact that Stern was not discussing expert tax counsel with Bodenstein in the latter's capacity as an attorney is shown explicitly in the May 18 conversation in connection with Bodenstein's speaking to Bender on Stern's behalf:

[Footnote continued on following page]

with Bodenstein were between two persons thrown together by their relationship to Steinman and their roles in the meat industry investigation and on that basis are not entitled to the protection of the privilege. *Modern Woodmen of America v. Watkins*, 132 F.2d 352 (5th Cir. 1942); *United States v. United Shoe Machinery Corp.*, *supra*; see also *Magida v. Continental Can Co.*, 12 F.R.D. 74 (S.D.N.Y. 1951).

POINT II

Judge Griesa erred in holding the conversation privileged because Bodenstein was acting as an intermediary between Stern and Mr. Bender.

Judge Griesa based his order, in the alternative, on the ground that even if Bodenstein and Stern did not have an attorney-client relationship at the time of the May 18 conversation, the conversation was still privileged because Stern's communications had been made to Bodenstein with the understanding that Bodenstein would act as his agent in communicating them to Mr. Bender for the purpose of securing advice for Stern. We respectfully submit that the trial judge erred in his view of the facts and the legal conclusion he drew from that view.

As a preliminary matter, it is apparent from the transcript of the May 18 conversation that the salient portion of Stern's utterances regarding his inability to explain his possession of the bonds had already occurred (GX 8, pp. 3-5) before the first mention of attorneys (GX 8, p. 6).

"Bodenstein I don't know, yeah, I, I think I know the answer as a lawyer Uh

Stern As an attorney you know the answer

Bodenstein But I'm not the pro in this area and LOU BENDER is, let me talk with him" (GX 8, p. 12).

Secondly, and crucially, even after a discussion of attorneys and further discussions of Stern's problem of finding a way to account for the bonds, it was still not contemplated by Stern that Bodenstein should act as his agent in communicating with Mr. Bender. It was Bodenstein who then first suggested that Mr. Bender should be contacted, and by Stern's lawyer. Later after Stern said his lawyers had told him to keep his mouth shut, *Bodenstein* suggested that he would ask Mr. Bender whether Mr. Bender's talking to Stern would raise "a conflict". Stern responded:

"What do you mean by that, now, whether my lawyer should contact.

Bodenstein: Yeah, how your lawyer should go about doing that" (GX 8, pp. 6-8).

It was only after Stern said that "I'm afraid of leaking" that Bodenstein said that he would "pose the problem without mentioning your name" to Bender (GX 8, p. 9). In short, while Bodenstein ultimately agreed to discuss Stern's problem with Mr. Bender, this course of action could not have been the reason that Stern discussed his problem with Bodenstein, for it was Bodenstein who initiated the idea that he talk to Bender about Stern's problem, and this occurred only after Stern had fully revealed the problem.

Moreover, even assuming that Stern's discussions with Bodenstein were initiated by Stern with the contemplation that Bodenstein should communicate to Mr. Bender what Stern had told him, there would still be no legal basis for attaching the attorney-client privilege to Stern's conversation with Bodenstein.

First, the notion that Stern's communications through the agency of Bodenstein to Mr. Bender are covered by the attorney-client privilege can only rest on the existence or

contemplated existence of an attorney-client relationship between Stern and Mr. Bender. Clearly, there was no existing attorney-client relationship between Stern and Mr. Bender at the time of the May 18 conversation, and indeed there is no evidence that Mr. Bender had ever heard of Stern at the time. The evidence also suggests that Stern cannot have intended on May 18 to enter into an attorney-client relationship with Mr. Bender, because he not only had a lawyer at the time, but he specifically instructed Bodenstein not to make any commitments to Mr. Bender and to put Stern's problem to Mr. Bender hypothetically without using his name (GX 8, pp. 9, 12). Moreover, given Stern's "... posture to keep MOE away from me" (GX 8, at p. 9), it is inconceivable that he could have wanted the lawyer who represented Steinman and Bodenstein to represent him in the same investigation. Secondly, even if Stern had been considering an attorney-client relationship, he had every reason to know that Mr. Bender could not represent him, as the fact that he has never been represented by Mr. Bender and is still represented by Mr. Grunewald shows, since, as Stern knew, Bender was Bodenstein's lawyer. Bodenstein was the son-in-law of Steinman, also Bender's client in this matter, and Steinman, according to the indictment, was the individual who delivered thousands of dollars in bribe payments to Stern over a four-year period. There was simply no basis, on the facts known to Stern, for him to believe that Mr. Bender would or could ethically represent him in connection with the Internal Revenue Service investigation, and Bodenstein specifically warned Stern about the conflict (GX 8, p. 8). No privilege can, under those circumstances, have attached to any of Stern's communications to Mr. Bender through Bodenstein. See *Smale v. United States*, *supra*; cf. *Prichard v. United States*, *supra*; VIII Wigmore, Evidence § 2304 at p. 587 (McNaughton rev. 1961).

Moreover, even if Stern's intentions or Mr. Bender's position did not deprive Stern's communications to him through

Bodenstein of protection of the privilege, it is clear that his use of Bodenstein to communicate with Bender for him made his statements to Bodenstein unprotected by the privilege. Communications to an attorney disclosed to third parties by the client or intended to be disclosed by the attorney to third parties are not privileged. See *In re Horowitz*, *supra*, 482 F.2d at 81; *United States v. McDonald*, 313 F.2d 832 (2d Cir. 1963); *United States v. Tellier*, 255 F.2d 441 (2d Cir.), *cert. denied*, 358 U.S. 821 (1958); *United States v. Blackburn*, 446 F.2d 1089 (5th Cir. 1971), *cert. denied*, 404 U.S. 1017 (1972); *Cafritz v. Koslow*, 167 F.2d 749 (D.C. Cir. 1948); *In re Bretto*, 231 F. Supp. 529 (D. Minn. 1964); *Radio Corp. of America v. Rauland Corp.*, 18 F.R.D. 440 N.D. Ill. 1955). While communications made by the client to persons other than the attorney he has retained may be privileged if the third party is employed by the attorney to assist the attorney in giving legal advice to the client, *United States v. Kovel*, *supra*, the participation of a third party in their confidential communications, when not "indispensable" for the making of the communication, deprives it of the privilege. *Himmelfarb v. United States*, 175 F.2d 924, 939 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949). Here there was no reason for Stern not to have approached Mr. Bender himself; his use of Bodenstein as a convenient conduit—Bodenstein having already scheduled a meeting with Mr. Bender for his own purposes—was clearly a mere "... convenience, which, unfortunately for the accused, served to remove the privileged character of whatever communications were made." *Himmelfarb v. United States*, *supra*, 175 F.2d at 939; see also *Garipey v. United States*, 189 F.2d 459, 463 (6th Cir. 1951); *La Lance & Grosjean Mfg. Co. v. Haberman Mfg. Co.*, 87 F. 563 (C.C.S.D.N.Y. 1898). Finally, while it goes too far to say that a communication to an attorney through an agent of the client can never be privileged, the privilege only attaches to communications through "... third parties whose connection with the client is based upon a *prior agency* such as the re-

lationship of secretary, nurse or partner to the client." *United States v. Andreadis*, 234 F. Supp. 341, 345 n. 3 (E.D. N.Y. 1964) (emphasis supplied). There was certainly no such prior relationship between Bodenstein and Stern at the time of their May 18 conversation, nor can any agency relationship, properly defined, *Edmond Mills v. C.I.R.*, 132 F.2d 753, 755 (1st Cir.), *cert. denied*, 319 U.S. 776 (1943), be said to have been entered into between them in connection with Bodenstein's undertaking to speak to Mr. Bender for Stern to "... pose the problem of a guy" (GX 8, p. 9).

POINT III

Even assuming that Stern's communication to Bodenstein was otherwise privileged, the privilege was forfeited by Stern's seeking of professional assistance to perpetrate a fraud.

Conceding for the moment that Stern's conversation with Bodenstein was privileged for either of the reasons given above, we submit, despite the trial judge's conclusion to the contrary, that the statements by Stern that he had bonds he could not account for are divested of the privilege because Stern's purpose in seeking to talk to Mr. Bender was clearly to perpetrate a fraud on the Internal Revenue Service and the Court. Stern's remarks in this context make this point crystal clear:

"Everything I've turned over to the accountant and he's worked it over. But the one major problem is how do account for this kind of shit. You know where did it come from.

* * * * *

The question is, is there any place that they can possibly account for any place this could have come from. Some posture got to be worked out, that's the situation.

* * * * *

So my posture is unless they tell me something, I don't know what to do, they may try to give me a rationale, some bullshit—of inheriting or something. I don't know. I don't know. There's got to be an answer. I just can't have no answer" (GX 8, pp. 5, 10).

At the hearing, Bodenstein's testimony on Stern's intent was unequivocal: "He was asking me for a magic pill that didn't exist . . . He was looking for any excuse, truthful or otherwise, and yes, was looking for a lie, was looking for a fabrication, was looking for any possible answer as to what happened to the fund. Bullshit, truth, fact, fiction, whatever" (Tr. 122, 127). Stern, while not conceding the accuracy of Bodenstein's testimony on this point, could furnish no contrary explanation for his statements about the bonds or his desire to be in contact with Mr. Bender (Tr. 248-256).

Under these circumstances the law is settled that the statements suppressed by Judge Griesa were not privileged.

"The privilege takes flight if the relationship is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told."

Clark v. United States, 289 U.S. 1, 15 (1932). See also *United States v. Bynum*, 360 F. Supp. 400, 417, *aff'd.*, 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds*, 42 U.S.L.W. 3646 (May 28, 1974); *United States v. Kahn*, 366 F.2d 259, 265 (2d Cir.), *cert. denied*, 385 U.S. 948 (1966); *United States v. Bob*, 106 F.2d 37, 40 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939); *A. B. Dick & Co. v. Marr*, 95 F. Supp. 83, 102 (S.D.N.Y. 1950), *dism.*, 197 F.2d 498 (2d Cir.), *cert. denied*, 344 U.S. 878 (1952); *United States v. Shew-*

felt, 455 F.2d 836, 840 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States v. Friedman*, 445 F.2d 1076, 1085-1086 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); *United States v. Hoffa*, 349 F.2d 20, 37 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966).

CONCLUSION

The order of the District Court should be reversed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

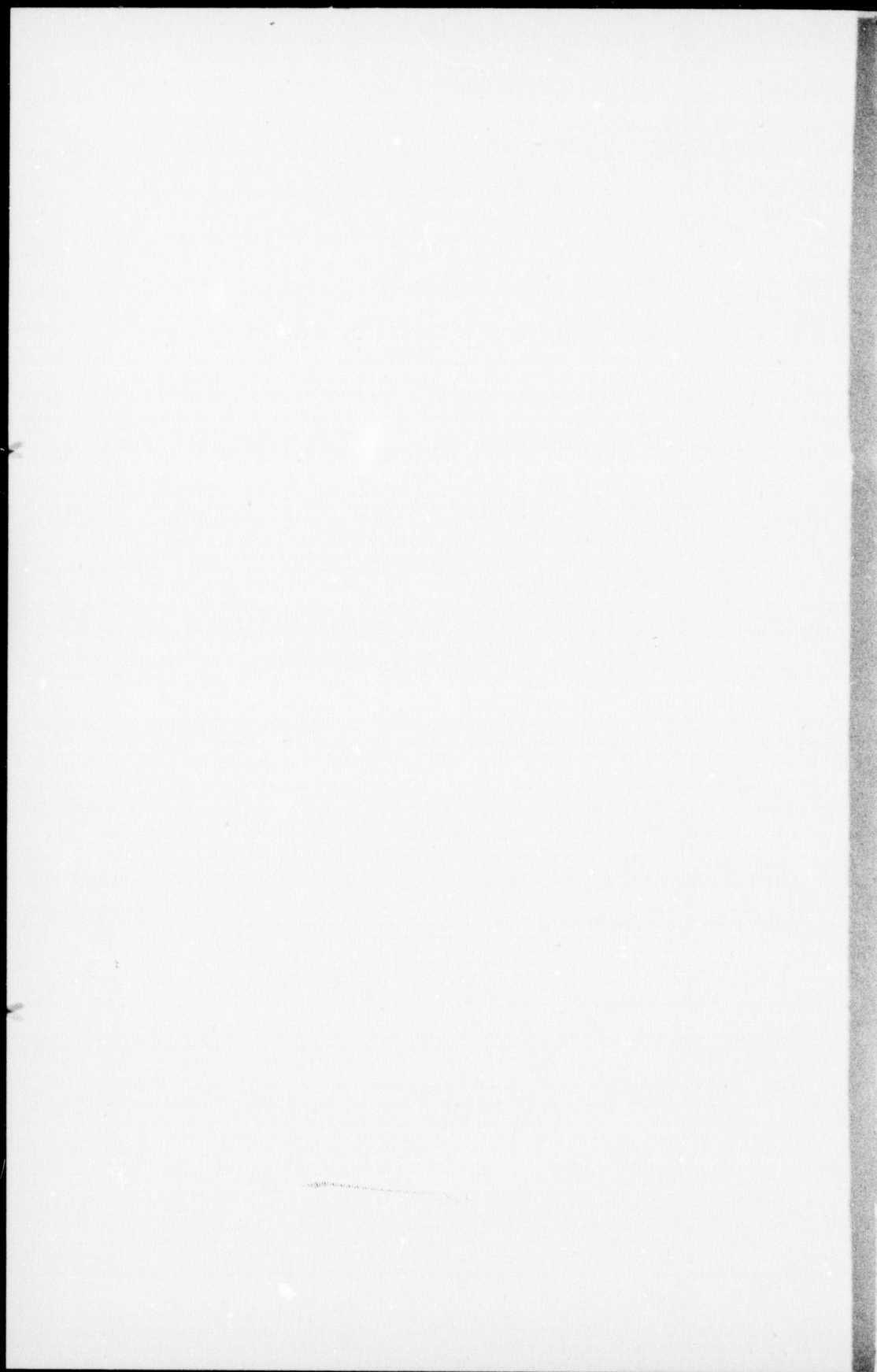
WILLIAM I. ARONWALD,
*Special Attorney,
United States Department of Justice,*

JOHN D. GORDAN, III,
*Assistant United States Attorney,
Of Counsel.*

APPENDIX

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Docket Entries
United States District Court
SOUTHERN DISTRICT OF NEW YORK

74 Cr. 287

UNITED STATES OF AMERICA,

—▼—

NICHOLAS ABONDOLO, MOE FLISS, and IRVING STERN,
Defendants.

Date

Proceedings

- 3-21-74—Filed indictment ordered sealed. B/W ordered & issued. Pollack, *J.*
- 3-25-74—Indictment ordered unsealed. Motley, *J.*
All defts. (attys. present) Plead not guilty. All defts. bails fixed at \$25,000. P.R.B. Case assigned to Judge Griesa for all purposes. Motley, *J.*
- 3-27-74—MOE FLISS—Filed notice of appearance by Michael J. Gillen, 16 Court St., B'klyn, N.Y. 11241 758-6464.
- 3-27-74—NICKOLAS ABANDOLA—Filed notice of appearance by Isaac Anole, 258 B'Way., NYC. 10007, Wo 2-6287.
- 3-25-74—NICHOLAS ABONDOLO—Filed P.R.B. in the amt. of \$25,000. to include Continental U.S.A.
- 3-25-74—MOE FLISS—Filed P.R.B. in the amt. of \$25,000. to include continental U.S.A.

Docket Entries
(74 Cr. 287)

<i>Date</i>	<i>Proceedings</i>
3-25-74	—IRVING STERN—Filed P.R.B. in the amt. of \$25,000. to include continental U.S.A.
3-27-74	—MOE FLISS—Filed Warrant for Arrest executed 3-25-74.
3-27-74	—IRVING STERN—Filed Warrant for Arrest executed 3-25-74.
3-27-74	—NICHOLAS ABONDOLO—Filed Warrant for Arrest executed 3-25-74.
4-22-74	—ALL DEFTS.—Filed affdvt. and notice of motion for B/P. Ret. 5-3-74.
4-29-74	—Filed defts. memo of law in support of motion for B/P.
6-10-74	—Filed Pltff's Bill of Particulars.
7-10-74	—Filed transcript of record of proceedings, dated May 9, 1974.
7-10-74	—Filed transcript of record of proceedings, dated June 5, 1974.
8-27-74	—IRVING STERN—Filed Motion to Suppress Privileged Statements and Affdvt in Support of Motion to Suppress.
8-27-74	—IRVING STERN—Filed Deft's Memorandum of Law in Support of Motion to Suppress A privileged Communications between Client and Atty.
9-12-74	—ALL DEFTS—Filed Motion to Dismiss Indictment.
9-12-74	—ALL DEFTS—Filed Memorandum of Law in Support of Motion to Dismiss Indictment.

Docket Entries
(74 Cr. 287)

*Date**Proceedings*

- 9-27-74—ALL DEFTS—Govt's Affdvt. in opposition to defts' motion to dismiss indictment.
- 9-27-74—ALL DEFTS—Govt's Memo. of Law in opposition to defts' motion to dismiss.
- 10- 2-74—IRVING STERN—Filed Govt's Affidavit in opposition to deft's motion to suppress etc.
- 10- 2-74—IRVING STERN—Filed Govt's Memo of Law in support of its affdvt. in opposition.
- 10- 8-74—All Defts—Reply Memorandum of Law in support of motion to dismiss indictment.
- 10-16-74—IRVING STERN—Filed Deft's Rebuttal Affidavit.
- 10-16-74—IRVING STERN—Filed Deft's Memorandum of Law in Rebuttal to Pltff's Counsel's reply memorandum to Deft's memorandum in support of Motion to Suppress privileged communication between Client and Atty.
- 10-21-74—AS TO ALL DEFTS. Conference held, atty's present. Count 3 dismissed. Adj. to 10-23-74. GRIESA, J.
- 10-23-74—MOE FLISS—Att'y present. Count 2 & 4 dismissed. GRIESA, J.
- 10-30-74—Filed defts affdvt & notice of motion to inspect grand jury impanelment orders.
- 10-31-74—Filed defts affdvt & notice of motion granting permission to reargue the motion heretofore made seeking dismissal of Counts 2, 3, 4 & 5. Time & date to be set by Court.

Docket Entries
(74 Cr. 287)

- | <i>Date</i> | <i>Proceedings</i> |
|-------------|---|
| 10-31-74 | —Filed transcript of record of proceedings, dated Sept 11, 1974. |
| 11- 4-74 | —Filed Memo—End. on defts motion of 10-30-74. Motion granted to extent stated at hearing of 11-1-74. . . . So Ordered, GRIESA, J. m/n. |
| 11- 6-74 | —IRVING STERN—Filed memo of law in support of request to have all statements allegedly made by him to any att'y. & in particular one Walter Bodenstein, be produced at the pre-trial suppression hearing on the issue of privileged communication. |
| 11- 6-74 | —IRVING STERN—Filed memorandum in reply to the Govt's memo of law on alleged false exculpatory statements. |
| 11- 7-74 | —Filed Order that motion of defts dtd 10-30-74 is granted to the extent requested except that portion seeking dismissal of the indictment, which is denied. . . . GRIESA, J. m/n. |
| 11-12-74 | —ALL DEFTS—Filed Pltff's Supplementary Bill of Particulars. |
| 11-21-74 | —Filed Govt's Notice of Appeal to USCA from the decision & Order of Griesa dated 11-19-74 granting deft's motion to suppress evidence. Notices mailed to Parties on 11-25-74. Raymond B. Grunewald, Esq.—Michael Gillen, Esq.—Albert J. Kreiger, Esq.—Irving Stern—Nicholas Abondole—Moe Fliss. |
| 11-26-74 | —Filed Government's designation of exhibits and exhibits attached therein. |

Docket Entries
(74 Cr. 287)

<i>Date</i>	<i>Proceedings</i>
11-25-74	Filed transcript of proceedings dated: 11-1-74.
11-25-74	Filed transcript of proceedings dated: 11-14-74.
11-26-74	Filed notice that the record on appeal has been sent to USCA.
11-18-74	Hearing on Suppression Motion by def't Stern.
11-19-74	Hearing continued & concluded. Motion by def't Stern to suppress tape conversation May 18, 1974, is granted in part & denied in part. GRIESA, J.
11-21-74	Gov't motion for Trial to be adj. pending appeal of Stern's motion to suppress. Denied. Deft's motion for interrogation of jurors by counsel—Denied. Gov't motion for def't's counsel to submit lists of jurors interviewed, Granted. . . . GRIESA, J.
12- 2-74	Filed transcript of record of proceedings, dated Oct. 18-23-1974.
12- 2-74	Filed transcript of record of proceedings, dated Nov. 18-19, 1974.
12- 2-74	Filed notice that record on appeal has been certified & transmitted to the USCA.

Docket Entries

United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Cr. 1049

UNITED STATES OF AMERICA,

—v.—

NICHOLAS ABONDOLO, MOE FLISS, and IRVING STERN,
Defendants.

11- 7-74—Filed indictment (Referred to Judge Griesa as related to 74 Cr. 287).

11-21-74—Filed notice of appeal from decision & Order of J. Griesa of 11-19-74 granting deft's motion to suppress evidence. Copies sent to:

Raymond B. Grunewald, 16 Court St.,
B'klyn, N.Y. 11241.

Michael Gillen, 16 Court St., B'klyn, N.Y. 11241.

Albert J. Kreiger, 401 B'way, N.Y.

Irving Stern, 1 Jodi Court, Monsey, N.Y.

Nicholas Abondolo, 38 Bolivar St., Staten Island,
N.Y.

Moe Fliss, 70-25 Yellowstone Blvd., Forest Hills,
N.Y.

Docket Entries
(74 Cr. 1049)

- 12- 2-74—Filed transcript of record of proceedings, dated Nov. 18-19-1974 (fld in 74 Cr. 287).
- 11-18-74—Hearing on Suppression Motion by Def't Stern.
- 11-19-74—Hearing con't & concluded. Motion by Def't Stern to suppress the tape conversation May 18, 1974, is granted in part & denied in part GRIESA, J.
- 11-21-74—Gov't motions for Trial to be adj. pending appeal of Stern's motion to suppress. Denied.
Deft's motion for interrogation of jurors by counsel—Denied.
Gov't motion for Deft's counsel to submit list of jurors interviewed—Granted. . . . GRIESA, J.
- 11-27-74—Filed notice that original record on appeal has been certified & transmitted to the USCA.

Indictment

United States District Court

SOUTHERN DISTRICT OF NEW YORK

74 Cr. 287

UNITED STATES OF AMERICA,

—v.—

NICHOLAS ABONDOLO, MOE FLISS, and IRVING STERN,
Defendants.

COUNT ONE

The Grand Jury charges:

1. From on or about January 1, 1968 up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, NICHOLAS ABONDOLO, MOE FLISS and IRVING STERN, the defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together with each other, and with other persons whose names are to the Grand Jury known and unknown, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Section 1962(c) and Title 29, United States Code, Section 186.

2. At all times relevant to this indictment the defendant NICHOLAS ABONDOLO was President, the defendant MOE FLISS was Secretary-Treasurer and the defendant IRVING STERN was Director of Organization of the Amalgamated Meat Cutters and Retail Food Stores Employees Union of Greater New York—Local 342, a union representing workers in the meat industry, with principal offices at 186-18 Hillside Avenue, Jamaica, New York.

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3. It was part of the conspiracy charged herein that the defendants, being persons employed by and associated with an enterprise engaged in, and the activities of which affected interstate commerce, to wit, the Amalgamated Meat Cutters and Retail Food Stores Employees Union of Greater New York, would conduct and participate directly and indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity, to wit, requesting, demanding, receiving and accepting payments and deliveries of money from employers.

4. It was further a part of said conspiracy that the defendants, being officers and employees of a labor organization, to wit, the Amalgamated Meat Cutters and Retail Food Stores Employees Union of Greater New York, which represented the employees of employers (hereinafter referred to as supermarket corporations) who were engaged in an industry affecting commerce, would unlawfully request, demand and accept payments and deliveries of money from said employers.

5. Among the means by which the defendants carried out said conspiracy were the following:

a. From on or about July, 1969 until on or about May 31, 1971 the defendants NICHOLAS ABONDOLO and IRVING STERN received approximately \$2,000 per month from Milton Cohen and Alvin Bernstein, meat buyers for Big Apple Supermarkets, Inc., through Moe Steinman. These payments were made for "labor peace" and "good will."

b. From on or about August, 1969 until on or about September, 1971 the defendants NICHOLAS ABONDOLO, MOE FLISS and IRVING STERN

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received quarterly payments of approximately \$1,000 from Jack Saker, the Chairman of the Board of Big Apple Supermarkets, Inc., in return for "labor peace" and "good will."

c. In or about December, 1971 the defendants NICHOLAS ABONDOLO, MOE FLISS and IRVING STERN received \$2,000 from Jack Saker, Executive Vice President of Fooderama, Inc., and George George, the Chairman of the Board of Big Apple Supermarkets, Inc., in return for "labor peace" and "good will."

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed by the defendants.

1. Between on or about January 1, 1968 and December 31, 1971 the defendants NICHOLAS ABONDOLO and IRVING STERN received monthly cash payments of approximately two thousand dollars (\$2,000) from Moe Steinman in the vicinity of the Luxor Baths at 121 West 46th Street and the Waldorf Astoria at Lexington Avenue and 49th Street.

2. In or about September, 1969 the defendants MOE FLISS and IRVING STERN received one thousand dollars (\$1,000) from Jack Saker at the Island Inn in Westbury, New York.

3. In or about December, 1969 the defendants MOE FLISS and IRVING STERN received two thousand dollars (\$2,000) from Jack Saker at the Island Inn in Westbury, New York.

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4. In or about December, 1971 the defendant NICHOLAS ABONDOLO met with George George in Linden, New Jersey.

5. In or about December, 1971 the defendant NICHOLAS ABONDOLO received two thousand dollars (\$2,000) from George George at a diner in Linden, New Jersey.

(Title 18, United States Code, Section 1962(d))

COUNT TWO

The Grand Jury further charges:

From on or about January 1, 1968, up to and including the date of the filing of this indictment, in the Southern District of New York, NICHOLAS ABONDOLO, MOE FLISS and IRVING STERN, the defendants, being persons employed by and associated with an enterprise engaged in, and the activities of which affected interstate commerce, to wit, an association, union and group of individuals known as Local 342 of the Amalgamated Meat Cutters and Retail Food Stores Employees Union of Greater New York, unlawfully, wilfully and knowingly did conduct and participate, directly and indirectly in the conduct of such enterprise's affairs, through a pattern of racketeering activity, to wit, a series of acts in violation of Title 29, United States Code, Section 186 which are set forth in Counts Three through Five of this indictment, and are incorporated by reference as if fully set forth herein.

(Title 18, United States Code, Section 1962(c))

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COUNTS THREE THROUGH FIVE

The Grand Jury further charges:

On or about the dates hereinafter set forth, in the Southern District of New York, NICHOLAS ABONDOLO, MOE FLISS and IRVING STERN, the defendants, being then and there officers and employees of a labor organization, to wit, Local 342 of the Amalgamated Meat Cutters and Retail Food Stores Employees Union of Greater New York, which represented the employees of employers who were engaged in an industry affecting commerce, did unlawfully request, demand, receive and accept payments and deliveries of money from employers as hereinafter set forth:

<i>Count</i>	<i>Date</i>	<i>Defendant</i>	<i>Amount</i>	<i>Employer</i>
3	In the year 1968	NICHOLAS ABONDOLO MOE FLISS IRVING STERN	\$18,000	Milton Cohen
4	In the year 1969	NICHOLAS ABONDOLO MOE FLISS IRVING STERN	24,000	Milton Cohen
5	In the year 1970	NICHOLAS ABONDOLO MOE FLISS IRVING STERN	24,000	Milton Cohen Alvin Bernstein

(Title 29, United States Code, Section 186(a) and (b)
and Title 18, United States Code, Section 2)

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COUNT SIX

The Grand Jury further charges:

From on or about January 1, 1968 up to and including on or about December 31, 1968, in the Southern District of New York, NICHOLAS ABONDOLO, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1968, by acts of concealment and by receiving cash payments from officials and employees of various super-market corporations and from wholesale suppliers of meat products, in return for "labor peace" and "good will", and having received said currency in the Southern District of New York the said NICHOLAS ABONDOLO did, on or about April 15, 1969 file with the Internal Revenue Service, a false and fraudulent joint income tax return, on behalf of himself and his wife, for the year 1968, wherein he omitted these cash payments and stated that their taxable income for said calendar year was the sum of \$25,237.00 and that the amount of tax due and owing thereon was the sum of \$6,563.00, whereas as he then and there well knew, their taxable income for the said calendar year was approximately the sum of \$29,106.48, upon which said taxable income they owed to the United States of America an income tax of \$8,096.39.

(Title 26, United States Code, Section 7201)

COUNT SEVEN

The Grand Jury further charges:

From on or about January 1, 1968 up to and including on or about December 31, 1968, in the Southern District

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of New York, MOE FLISS, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1968, by acts of concealment and by receiving cash payments from officials and employees of various supermarket corporations and from wholesale suppliers of meat products, in return for "labor peace" and "good will", and having received said currency in the Southern District of New York the said MOE FLISS did, on or about April 15, 1969 file with the Internal Revenue Service, a false and fraudulent joint income tax return, on behalf of himself and his wife, for the year 1968, wherein he omitted these cash payments and stated that their taxable income for said calendar year was the sum of \$17,070.72 and that the amount of tax due and owing thereon was the sum of \$3,826.79, whereas as he then and there well knew, their taxable income for the said calendar year was approximately the sum of \$21,070.72, upon which said taxable income they owed to the United States of America an income tax of \$5,076.83.

(Title 26, United States Code, Section 7201)

COUNT EIGHT

The Grand Jury further charges:

1. On or about the 15th day of April, 1969, in the Southern District of New York, the defendant IRVING STERN, who during the calendar year 1968 was married, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1968, by preparing and causing to be pre-

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pared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Southern District of New York, a false and fraudulent joint income tax return on behalf of himself and his wife which was filed with the Internal Revenue Service, North Atlantic Service Center at Andover, Massachusetts, wherein it was stated that their taxable income for said calendar year was the sum of \$41,929.72 and that the amount of tax due and owing thereon was the sum of \$14,046.22, whereas as he then and there well knew, their taxable income for said calendar year was approximately the sum of \$45,804.94, upon which said taxable income they owed to the United States of America an income tax of \$16,084.66.

2. The unreported taxable income in the approximate amount of \$3,875.22 represented cash paid to and for the benefit of the defendant IRVING STERN, Director of Operations of Local 342 of the Amalgamated Meat Cutters and Retail Food Stores Employees Union of Greater New York, by Moe Steinman, a principal owner of Trans-World Brokerage, Inc., Jack Saker, an executive officer of Food-erama, Inc. and Big Apple Supermarkets, Inc., and Milton Cohen, an employee of Big Apple Supermarkets, Inc., in return for "labor peace" and "good will".

(Title 26, United States Code, Section 7201)

COUNT NINE

The Grand Jury further charges:

On or about the 15th day of April, 1969, in the Southern District of New York, the defendant IRVING STERN, a resident of Monsey, New York, unlawfully, wilfully and knowingly did make and subscribe and cause to be made

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and subscribed a 1968 United States Joint Income Tax Return (Form 1040) on behalf of himself and his wife, which tax return was verified by a written declaration that it was made under penalties of perjury, and was filed with the Internal Revenue Service, North Atlantic Service Center at Andover, Massachusetts, which the defendant did not believe to be true and correct as to every material matter in that the said defendant falsely stated therein that their taxable income during the period January 1, 1968 to December 31, 1968 was \$41,929.72 whereas, in truth and in fact, as the said defendant well knew, their taxable income for said period was \$45,804.94.

(Title 26, United States Code, Section 7206(1))

COUNT TEN

The Grand Jury further charges:

From on or about January 1, 1969 up to and including on or about December 31, 1969, in the Southern District of New York, NICHOLAS ABONDOLO, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1969, by acts of concealment and by receiving cash payments from officials and employees of various super-market corporations and from wholesale suppliers of meat products, in return for "labor peace" and "good will", and having received said currency in the Southern District of New York said NICHOLAS ABONDOLO did, on or about April 15, 1970 file with the Internal Revenue Service, a false and fraudulent joint income tax return, on behalf of himself and his wife, for the year 1969, wherein he omitted these cash payments and stated that their taxable in-

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come for said calendar year was the sum of \$16,360.00 and that the amount of tax due and owing thereon was the sum of \$3,697.00, whereas as he then and there well knew, their taxable income for the said calendar year was the sum of \$24,328.00, upon which said taxable income they owed to the United States of America an income tax of \$6,355.84.

(Title 26, United States Code, Section 7201)

COUNT ELEVEN

The Grand Jury further charges:

From on or about January 1, 1969 up to and including on or about December 31, 1969, in the Southern District of New York, MOE FLISS, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1969, by acts of concealment and by receiving cash payments from officials and employees of various supermarket corporations and from wholesale suppliers of meat products, in return for "labor peace" and "good will", and having received said currency in the Southern District of New York the said MOE FLISS did, on or about April 15, 1970 file with the Internal Revenue Service, a false and fraudulent joint income tax return, on behalf of himself and his wife, for the year 1969, wherein he omitted these cash payments and stated that their taxable income for said calendar year was the sum of \$18,969.80 and that the amount of tax due and owing thereon was the sum of \$4,500.60, whereas as he then and there well knew, their taxable income for the said calendar year was the sum of \$26,969.80, upon which said taxable income they owed to the United States of America an income tax of \$7,402.04.

(Title 26, United States Code, Section 7201).

Indictment
(74 Cr. 287)

COUNT TWELVE

The Grand Jury further charges:

1. That on or about the 15th day of April, 1970, in the Southern District of New York, the defendant IRVING STERN, who during the calendar year 1969 was married, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1969, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Southern District of New York, a false and fraudulent joint income tax return on behalf of himself and his wife which was filed with the Internal Revenue Service, North Atlantic Service Center at Andover, Massachusetts, wherein it was stated that their taxable income for said calendar year was the sum of \$16,355.81 and that the amount of tax due and owing thereon was the sum of \$3,695.58, whereas as he then and there well knew, their taxable income for said calendar year was the sum of \$21,065.09, upon which said taxable income they owed to the United States of America an income tax of \$5,192.91.

2. The unreported taxable income in the approximate amount of \$4,709.28 represented cash paid to and for the benefit of the defendant IRVING STERN, Director of Operations of Local 342 of the Amalgamated Meat Cutters and Retail Food Stores Employees Union of Greater New York, and paid by Moe Steinman, a principal owner of Trans-World Brokerage, Inc., Jack Saker, an executive officer of Fooderama, Inc. and Big Apple Supermarkets, Inc. and Milton Cohen, an employee of Big Apple Supermarkets, Inc., in return for "labor peace" and "good will".

(Title 26, United States Code, Section 7201)

Indictment
(74 Cr. 287)

COUNT THIRTEEN

The Grand Jury further charges:

On or about the 15th day of April, 1970, in the Southern District of New York, the defendant IRVING STERN, a resident of Monsey, New York, unlawfully, wilfully and knowingly did make and subscribe and cause to be made and subscribed a 1969 United States Joint Income Tax Return (Form 1040) on behalf of himself and his wife, which tax return was verified by a written declaration that it was made under penalties of perjury, and was filed with the Internal Revenue Service, North Atlantic Service Center at Andover, Massachusetts, which the defendant did not believe to be true and correct as to every material matter in that the said defendant falsely stated therein that their taxable income during the period January 1, 1969 to December 31, 1969 was \$16,355.81 whereas, in truth and in fact, as the said defendant well knew, their taxable income for said period was \$21,065.09.

(Title 26, United States Code, Section 7206(1))

COUNT FOURTEEN

The Grand Jury further charges:

From on or about January 1, 1970 up to and including on or about December 31, 1970, in the Southern District of New York, NICHOLAS ABONDOLO, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1970, by acts of concealment and by receiving cash payments from officials and employees of various supermarket corporations and from wholesale suppliers of meat

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products, in return for "labor peace" and "good will", and having received said currency in the Southern District of New York the said NICHOLAS ABONDOLO did, on or about April 15, 1971 file with the Internal Revenue Service, a false and fraudulent joint income tax return, on behalf of himself and his wife, for the year 1970, wherein he omitted these cash payments and stated that their taxable income for said calendar year was the sum of \$18,152.00 and that the amount of tax due thereon was the sum of \$3,960.00, whereas as a matter of fact and there well knew, their taxable income for the said calendar year was the sum of \$31,361.67, upon which said taxable income they owed to the United States of America an income tax of \$8,621.33.

(Title 26, United States Code, Section 7201)

COUNT FIFTEEN

The Grand Jury further charges:

From on or about January 1, 1970 up to and including on or about December 31, 1970, in the Southern District of New York, MOE FLISS, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by acts of concealment and by receiving cash payments from officials and employees of various supermarket corporations and from wholesale suppliers of meat products, in return for "labor peace" and "good will", and having received said currency in the Southern District of New York the said MOE FLISS did, on or about April 15, 1971, file with the Internal Revenue Service, a false and fraudulent joint income tax return, on behalf of himself and his wife, for the year 1970, wherein he omitted these cash payments and stated that

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their taxable income for said calendar year was the sum of \$19,949.90 and that the amount of tax due and owing thereon was the sum of \$4,475.12, whereas as he then and there well knew, their taxable income for the said calendar year was the sum of \$34,616.56, upon which said taxable income they owed to the United States of America an income tax of \$10,002.92.

(Title 26, United States Code, Section 7201)

COUNT SIXTEEN

The Grand Jury further charges:

1. That on or about the 15th day of April, 1971 in the Southern District of New York, the defendant IRVING STERN, who during the calendar year 1970 was married, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1970, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Southern District of New York, a false and fraudulent joint income tax return on behalf of himself and his wife which was filed with the Internal Revenue Service, North Atlantic Service Center at Andover, Massachusetts, wherein it was stated that their taxable income for said calendar year was the sum of \$22,977.06 and that the amount of tax due and owing thereon was the sum of \$5,465.96, whereas as he then and there well knew, their taxable income for said calendar year was the sum of \$37,051.16, upon which said taxable income they owed to the United States of America an income tax of \$11,083.35.

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(74 Cr. 287)

2. The unreported taxable income in the approximate amount of \$14,074.10 represented cash paid to and on behalf of the defendant IRVING STERN, Director of Operations of Local 342 of the Amalgamated Meat Cutters and Retail Food Stores Employees Union of Greater New York, and paid by Moe Steinman, a principal owner of Trans-World Brokerage, Inc., Jack Saker, an executive officer of Fooderama, Inc. and Big Apple Supermarkets, Inc., and Milton Cohen, an employee of Big Apple Supermarkets, Inc., in return for "labor peace" and "good will".

(Title 26, United States Code, Section 7201)

COUNT SEVENTEEN

The Grand Jury further charges:

On or about the 15th day of April, 1971, in the Southern District of New York, the defendant IRVING STERN, a resident of Monsey, New York, unlawfully, wilfully and knowingly did make and subscribe and cause to be made and subscribed a 1970 United States Joint Income Tax Return (Form 1040) on behalf of himself and his wife, which tax return was verified by a written declaration that it was made under penalties of perjury, and was filed with the Internal Revenue Service, North Atlantic Service Center at Andover, Massachusetts which the defendant did not believe to be true and correct as to every material matter in that the said defendant falsely stated therein that their taxable income during the period January 1, 1970 to December 31, 1970 was \$22,977.06 whereas, in truth and in fact, as the said defendant well knew, their taxable income for said period was \$37,051.16.

(Title 26, United States Code, Section 7206(1))

Indictment
(74 Cr. 287)

COUNT EIGHTEEN

The Grand Jury further charges:

From on or about January 1, 1971 up to and including on or about December 31, 1971, in the Southern District of New York, NICHOLAS ABONDOLO, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1971, by acts of concealment and by receiving cash payments from officials and employees of various super-market corporations and from wholesale suppliers of meat products, in return for "labor peace" and "good will", and having received said currency in the Southern District of New York the said NICHOLAS ABONDOLO did, on or about April 15, 1972, file with the Internal Revenue Service, a false and fraudulent joint income tax return, on behalf of himself and his wife, for the year 1971, wherein he omitted these cash payments and stated that their taxable income for said calendar year was the sum of \$18,119.00 and that the amount of tax due and owing thereon was the sum of \$3,853.00, whereas, as he then and there well knew, their taxable income for the said calendar year was the sum of \$28,084.37, upon which said taxable income they owed to the United States of America an income tax of \$7,142.90.

(Title 26, United States Code, Section 7201)

COUNT NINETEEN

The Grand Jury further charges:

From on or about January 1, 1971 up to and including on or about December 31, 1971, in the Southern District

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of New York, MOE FLISS, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1971, by acts of concealment and by receiving cash payments from officials and employees of various supermarket corporations and from wholesale suppliers of meat products, in return for "labor peace" and "good will", and having received said currency in the Southern District of New York the said MOE FLISS did, on or about April 15, 1972, file with the Internal Revenue Service, a false and fraudulent joint income tax return, on behalf of himself and his wife, for the year 1971, wherein he omitted these cash payments and stated that their taxable income for said calendar year was the sum of \$21,345.26 and that the amount of tax due and owing thereon was the sum of \$4,810.48, whereas as he then and there well knew, their taxable income for the said calendar year was the sum of \$31,345.26, upon which said taxable income they owed to the United States of America an income tax of \$8,404.65.

(Title 26, United States Code, Section 7201)

COUNT TWENTY

The Grand Jury further charges:

1. That on or about the 15th day of April, 1972, in the Southern District of New York, the defendant IRVING STERN, who during the calendar year 1971 was married, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1971, by preparing and causing to be prepared, by signing and causing to be signed, and by mail-

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ing and causing to be mailed, in the Southern District of New York, a false and fraudulent joint income tax return on behalf of himself and his wife which was filed with the Internal Revenue Service, North Atlantic Service Center at Andover, Massachusetts, wherein it was stated that their taxable income for said calendar year was the sum of \$30,201.08 and that the amount of tax due and owing thereon was the sum of \$7,958.42 whereas as he then and there well knew, their taxable income for said calendar year was the sum of \$35,909.05, upon which said taxable income they owed to the United States of America an income tax of \$10,301.80.

2. The unreported income in the approximate amount of \$5,707.97 represented cash paid to and on behalf of the defendant IRVING STERN, Director of Operations of Local 342 of the Amalgamated Meat Cutters and Retail Food Stores Employees Union of Greater New York, and paid by Moe Steinman, a principal owner of TransWorld Brokerage, Inc., Jack Saker, an executive officer of Foode-rama, Inc. and Big Apple Supermarkets, Inc., and Milton Cohen, an employee of Big Apple Supermarkets, Inc., in return for "labor peace" and "good will."

(Title 26, United States Code, Section 7201)

COUNT TWENTY-ONE

The Grand Jury further charges:

On or about the 15th day of April, 1972, in the Southern District of New York, the defendant IRVING STERN, a resident of Morsey, New York, unlawfully, wilfully and knowingly did make and subscribe and cause to be made and subscribed a 1971 United States Joint Income Tax Re-

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turn (Form 1040) on behalf of himself and his wife, which tax return was verified by a written declaration that it was made under penalties of perjury, and was filed with the Internal Revenue Service, North Atlantic Service Center at Andover, Massachusetts, which the defendant did not believe to be true and correct as to every material matter in that the said defendant falsely stated therein that their taxable income during the period January 1, 1971 to December 31, 1971 was \$30,201.08 whereas, in truth and in fact, as the said defendant well knew, their taxable income for said period was \$35,909.05.

(Title 26, United States Code, Section 7206(1))

.....

PAUL J. CURRAN
United States Attorney for the
Southern District of New York

.....

Foreman

Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Cr. 1049

UNITED STATES OF AMERICA,

—v.—

NICHOLAS ABONDOLO, MOE FLISS, and IRVING STERN,
Defendants.

COUNT ONE

The Grand Jury charges:

From on or about January 1, 1968, up to and including on or about May 1, 1971, in the Southern District of New York, the defendants, NICHOLAS ABONDOLO, MOE FLISS and IRVING STERN, being persons who were officers of, employed by and associated with an enterprise engaged in, and the activities of which affected interstate commerce, to wit, an association, union and group of individuals known as Local 342 of the Amalgamated Meat Cutters and Retail Food Stores Employees Union of Greater New York, unlawfully, wilfully and knowingly did conduct and participate, directly and indirectly, in the conduct of such enterprise's affairs, through a pattern of racketeering activity, to wit, by accepting monthly payments of cash, in the sum of approximately \$2,000.00 each month, from employers, in violation of Title 29, United States Code, Section 186.

(Title 18, United States Code, Section 1962(c).)

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COUNT TWO

The Grand Jury further charges:

From on or about January 1, 1970 up to and including on or about May 1, 1971, in the Southern District of New York, the defendants NICHOLAS ABONDOLO, MOE FLISS and IRVING STERN, being then and there officers and employees of a labor organization, to wit, Local 342 of the Amalgamated Meat Cutters and Retail Food Stores Employees Union of Greater New York, which represented the employees of employers who were engaged in an industry affecting commerce, did unlawfully, wilfully and knowingly request, demand, receive and accept, and agree to receive and accept payments and deliveries of monies each month in the sum of approximately \$2,000.00 per month from employers, to wit, Milton Cohen and Alvin Bernstein.

(Title 29, United States Code, Section 186(a) and (b), and Title 18, United States Code, Section.)

COUNT THREE

The Grand Jury further charges:

From on or about January 1, 1968 up to and including on or about December 31, 1968, in the Southern District of New York, IRVING STERN, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar year 1968, by acts of concealment and by receiving cash payments from officials and employees of various supermarket corporations and from wholesale suppliers of meat products, in return for "labor peace" and "good will", and having received said

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currency in the Southern District of New York, the said IRVING STERN, did, on or about April 15, 1969, file with the Internal Revenue Service, a false and fraudulent joint income tax return, on behalf of himself and his wife, for the year 1968, wherein he omitted these cash payments and stated that their taxable income for said calendar year was the sum of \$41,929.72 and that the amount of tax due and owing thereon was the sum of \$14,046.22, whereas as he then and there well knew, their taxable income for the said calendar year was the sum of \$45,804.94, upon which said taxable income they owed to the United States of America an income tax of \$16,084.66.

(Title 26, United States Code, Section 7201.)

COUNT FOUR

The Grand Jury further charges:

From on or about January 1, 1969 up to and including on or about December 31, 1969, in the Southern District of New York, IRVING STERN, the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the income taxes due and owing by him to the United States of America for the calendar 1969, by acts of concealment and by receiving cash payments from officials and employees of various supermarket corporations and from officials and employees of various supermarket corporations and from wholesale suppliers of meat products, in return for "labor peace" and "good will", and having received said currency in the Southern District of New York the said IRVING STERN did, on or about April 15, 1970, file with the Internal Revenue Service, a false and fraudulent joint income tax return, on behalf of himself and his

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wife, for the year 1969, wherein he omitted these cash payments and stated that their taxable income for said calendar year was the sum of \$16,355.81 and that the amount of tax due and owing thereon was the sum of \$3,695.58, whereas as he then and there well knew, their taxable income for the said calendar year was the sum of \$21,065.09, upon which said taxable income they owed to the United States of America an income tax of \$5,192.91.

(Title 26, United States Code, Section 7201.)

.....
PAUL J. CURRAN
United States Attorney

.....
Foreman

Excerpt From Transcript

(261)

Q. In your conversations immediately prior to May 18, 1973, did you relate information about municipal bonds?

A. Yes, I did.

Q. To Walter Bodenstein? A. Yes, I did.

Q. What other items were mentioned? A. I discussed the fact that I had made loans, that I had borrowed money on borrowed bonds, and I was concerned about all of this.

Q. Was there any discussion as you spoke to the Court with respect to interest and that sort of thing? A. Yes, I was concerned about that aspect.

Q. Did you relate them to Walter Bodenstein? A. I did——

Mr. Aronwald: Your Honor, I object. Counsel is leading him down the primrose path.

The Court: I just think we are not getting anywhere. Let's terminate this, please.

You may step down.

We all have to get to lunch. It is almost a quarter after one, but we have had a full day of hearing on this motion to suppress this short transcript and the conversations as a whole.

(262)

I know that the Government suggests playing the transcript and tape and I am perfectly willing to hear it, but I am faced with the fact which is really unavoidable, that beginning on page 6, the discussion is clearly in terms of finding an attorney for Mr. Stern, arranging for communication with that attorney.

It would seem to me that—let me back up. I have no doubt that the relationship between Mr. Bodenstein and Mr. Stern originated in other than an attorney-client relationship and that the relationship even as of May 18th may have had several aspects.

Excerpt From Transcript

But it does seem to me that we can put this in compartments and that if a part of the relationship pertained to the attorney-client privilege, we ought to be capable of delineating that.

It seems to me that there are many ambiguities in this transcript and in the whole situation. But one thing is clear, that for whatever reason, Mr. Stern and Mr. Bodenstein commenced on May 6th were talking about consultation with another attorney and it was very quickly arrived at that that consultation would be with Mr. Louis Bender, whom, I think—who is known in this court and I'm sure known otherwise as a perfectly reputable tax attorney and criminal attorney.

(263)

So if the relationship started out as Mr. Bodenstein being a go-between between Mr. Stern and Moe Steinman or started out for the purpose of having Mr. Bodenstein furnish information about the goings-on in various investigations, at least as of this moment, they were clearly talking about getting some legal advice for Mr. Stern.

That is the only purpose I can conceive of and the only purpose evidence from the transcript of having Mr. Bender come into the picture at all.

One could say that even in that regard there was no attorney-client privilege because any non-attorney can act as a go-between or as a recommender of attorneys. And Mr. "X" or Mr. "Y" might have recommended to Mr. Stern the name of Louis Bender or might have offered to go to Louis Bender and shield the identity temporarily of Mr. Stern.

So I suppose that the role of recommending Mr. Bender, the role of acting as a temporary go-between is a little ambiguous in itself, but the fact is that Mr. Bodenstein was an attorney, and that the objective of the approaches to Mr. Bender were to obtain legal advice.

Excerpt From Transcript

So whether Mr. Bodenstein was acting as an attorney or whether he was acting as an agent for Mr. Stern, it seems to me in either event, the communications (264) pertaining to the obtaining of legal advice and, in either event, they should be protected to the extent that they did in fact pertain to the obtaining of that legal advice.

I would assume that in order for Mr. Bodenstein to go to Mr. Bender, he had to have some information about the problem, and he was given that information and the giving of that information itself, to me, should be protected by the attorney-client privilege.

I would say that sorting out all the confusing points of this and the ambiguities, we have some clarity in the fact that there was this approach to Mr. Bender.

So I would start with the proposition that the material on page 6 is entirely privileged; at the top of page 7, Mr. Stern is referring to wanting help, and then down a few lines, Mr. Bodenstein says, "Let me talk to Bender." So the direction of that is getting legal help from Bender.

Down in the middle of the page, Mr. Stern says he doesn't want to link his situation with Moe Steinman and Iowa Beef. Well that was his problem, that is why he wanted to go to Mr. Bender.

What Mr. Bender was able to do for him, if anything, I don't know. Maybe Mr. Stern didn't have a very clear idea and maybe nothing resulted, but that isn't the (265) point, and we don't really have to get to that.

A person can seek legal advice without having any clear idea of what the lawyer can do for him and maybe the advice doesn't do anything, but the initial approach and the questioning and all, the giving of information doesn't lose its privilege simply because it was an unfruitful approach.

More talk on page 8 about the arrangements to go to Mr. Bender. And there is no doubt about it that initially Mr. Stern was so concerned about talking outside of his own attorney or talking beyond his own attorney,

Excerpt From Transcript

Mr. Bodenstein, he didn't even want to go to Mr. Bender himself or have his name identified. He is for some reason afraid of that. That doesn't mean the privilege is lost.

More talk about going to Mr. Bender on page 8 and page 10, as on page 5, there is an evident concern about finding an answer for the source of these funds, and maybe that was the main reason Mr. Stern wanted to go see Mr. Bender, and maybe Mr. Stern was willing to fabricate an answer, I don't know quite what was going on in his mind.

But that again doesn't mean that there was a criminal purpose in going to see a reputable lawyer. I don't think that possibility that we have just talked about, that maybe Mr. Stern was thinking that even if fabricating, (266) that doesn't deprive the communications about the approach to the attorney of their privilege.

On page 11 down at the bottom, Mr. Bodenstein says something to the effect to Mr. Stern, "Your lawyer feels that you shouldn't"—I don't know what is meant by "shouldn't." Anyway, he says to Mr. Stern, "You feel you need some advice possibly and you don't know which way to handle it."

So again there is a discussion in terms of getting advice, obviously legal advice from this tax specialist.

On page 12, Mr. Bodenstein says, "But I am not the pro in this area and Lou Bender is. Let me talk to him."

Right above that, Mr. Bodenstein says—after again a long explanation of this problem which concerned Mr. Stern, Mr. Stern says, "What is the answer? What is the posture of the guy? Do I have to explain?"

Bodenstein says, "I don't know. Yeah, I think I know the answer as a lawyer."

Then Stern interrupts and says, "As an attorney, you know the answer?"

Bodenstein says, "But I'm not the pro in this area and Lou Bender is. Let me talk with him."

Excerpt From Transcript

(267)

We have analyzed the pages between 6 and the end of the transcript and it seems to me they are all related to the matters of approaching Mr. Bender for legal advice and having Mr. Bodenstein initially act as a go-between, since he cannot seem to give the advice that Mr. Stern wants.

Before 6, we have got five pages and I think they break into two categories. I am eliminating the initial material before Mr. Stern even arrives.

I would say possibly, and I don't like to cut this so final, I think that it probably—the relationships don't change every split second, but I think it is possible that on page 2, that material was—has a different standing.

It seems to me that there may be initial chit-chat, more than chit-chat, initial follow-up of some non-legal talks. Maybe page 2 falls in that, and I'd be willing to hear you about that.

Page 3, we start the area where Mr. Bodenstein is interrogating Mr. Stern about the bonds. I really can't see any reason for that type of interrogation unless it relates to somehow getting him the legal advice that he is seeking. And I would assume that Mr. Bodenstein must have known before we get to page 6 and before the specific (268) attorneys are mentioned, that Mr. Stern was seeking legal advice.

This isn't the kind—this interrogation about the bonds is a very lawyer-like interrogation and it doesn't seem to me it is the kind of exchange which would go on just about maybe passing information back and forth to Moe Steinman.

And if Mr. Stern insists that it was given in connection with obtaining legal advice, and indeed, a few pages later we work in express language with legal advice, I wouldn't be in a position, I don't think, to disbelieve Mr. Stern on that point.

I would think that in my view, and I suppose we are going to hear more argument about it, but I would think

Excerpt From Transcript

that everything beginning with the part on page 3, which starts out—"Bodenstein: Now, with the bonds, you are talking. The number keeps switching. I don't know where we are at with that."

It would seem to me from there on, the conversation is privileged, and perhaps the previous passages stand in a different category.

I went into this because I think we have spent a great deal of time and I think we had reached a point of diminishing returns.

* * * * *

(294)

Mr. Aronwald: Your Honor, I most respectfully submit to the Court that under all the circumstances here there is neither an attorney-client relationship and even assuming there was such a relationship, the advice or aid sought was not the type of advice or aid which would give rise to any privilege.

And I would, with your Honor's permission, cite from a case which I did not cite in my memorandum. It is the case of *Clark vs. The United States*, reported at 29 U.S. 1, 193, where Justice Cardozo said with respect to the attorney-client privilege, "The privilege takes flight if the relationship is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told."

And I suggest to the Court that there is no logical explanation for that portion of the transcript on page 5 or 10 with respect to the fact that Mr. Stern indicated that he had no explanation and that he could not have no explanation, and he had to come up with an answer.

And then he goes into the language on page 10 which refers to the inheritance.

The Court: What is the fraud he committed as a result of these conversations?

Excerpt From Transcript

(295)

Mr. Aronwald: What he is talking about, your Honor, is that he needs an answer. He has to come up with an explanation. And what he is alluding to is maybe his lawyer and accountant will come up with some rationale.

The Court: Is the Government claiming that that in fact in consequence of these conversations commit a fraud and do something?

Mr. Aronwald: No, not in consequence of these conversations.

The Court: Or subsequent to them?

Mr. Aronwald: He doesn't have to actually consummate the fraud. If he seeks advice to aid him in the commission of a fraud, the fact that he didn't commit a fraud doesn't make any difference.

The Court: It seems to me, Mr. Aronwald, that you really are exaggerating the import of these statements. Here is a man who says that he is indeed innocent of taking a bribe.

Mr. Aronwald: From IBP. This case that we have now doesn't involve IBP. They are in no way involved in the indictment before this Court. The tape recording refers to the fact that Mr. Stern did not receive any moneys in connection with IBP. This is a different situation.

The Court: Fine. Be that as it may, he is (296) saying that for the subject that they are talking about, he is innocent. And then he is saying he has got, nevertheless, a problem about the bonds. He can't think up or have records of or otherwise, he cannot right now think up an explanation of the source of those funds to cover some problem which he is concerned about, and he wants to know what to do.

Mr. Aronwald: He doesn't say on the tape, your Honor, that he cannot at this minute explain it. He says "I have no explanation." He says, "The one major problem is how do you account for this, where did it come from?" On page 5.

The Court: Where is it that he says that he is intend-

Excerpt From Transcript

ing or planning to make a fraudulent explanation for that problem?

Mr. Aronwald: I suggest to the Court that there is no other possible explanation for the conversation on page 10.

The Court: What is it?

Mr. Aronwald: Page 10.

The Court: I think you quoted it erroneously. The actual quote: "So my posture is unless they tell me something I don't know what to do. They may say to (297) give a rationale"—the key word is "may," they may say to give a rationale, some—blank—of inheriting or something, I don't know. I don't know. There has got to be an answer, I just can't have a no answer."

And then he says, "I want to talk to this reputable lawyer, Mr. Bender."

That does not go as far as you claim it goes in saying, I intend to try to fabricate some fraud, and I want advice, Mr. Bodenstein, about how we can work out that fraud and I am going to try to get advice from Mr. Bender about how we can work out a fraud. The words speak for themselves. I don't think they go nearly as far as you say they do, and I think they fall short of the planning of a fraud or whatever it is that constitutes the waiver or misuse of the privileged communication and they fall short in substantial respects.

So that is the way I feel about that.

Mr. Aronwald: Just for the purpose of the record, where you were quoting from on page 10, you said some blank explanation, and I think the record should reflect it is "expletive deleted."

The Court: All right. We have had that.

Mr. Aronwald: In summary I have stated the Government's position.

* * * * *

(306)

[Mr. Aronwald:]

There have to be certain elements present. The Wigmore definition of the case is cited. If one goes to somebody

Excerpt From Transcript

who happens to be a lawyer and is seeking advice not in that person's capacity as a lawyer, but as a friend, as a business advisor, as a personal advisor, no privilege attaches. And I don't see how we can find the relationship to have existed on May 1- when on two prior occasions Mr. Stern said he had asked Mr. Bodenstein to represent him and Bodenstein refused, and Bodenstein himself said that on May 18 he didn't view Mr. Stern as his client.

There was more than just a casual relationship between Irving Stern than Moe Steinman. Walter Bodenstein is Moe Steinman's son-in-law. Consistent with what Mr. Bodenstein said yesterday, one of his motives in discussing this with Bodenstein is that Bodenstein would carry the word back to Steinman and Steinman would send the word back to Stern with some assistance or help or some other information that Mr. Stern was desirous of having. I think that is the common thread throughout Bodenstein's testimony. I think it is supported by the taperecorder.

The Court: I think we have had enough discussion. I will just enlarge on my comments in this respect.

I have heard the tape and I have heard further argument by counsel and I adhere to the ruling that I made (307) before lunch; that is that the motion to suppress is granted to the extent of all parts of the tape or the transcript starting with the statement by Bodenstein on page 3 of the transcript, "Now, with the bonds you are talking about", et cetera

I am denying the motion with respect to all parts of tape and the transcript coming before that I do not think I have anything more to say on the reason, except that I might clarify one thing.

Mr. Aronwald asked whether I was holding that there was an attorney client relationship between Mr. Stern and Mr. Bodenstein on the 18th or whether I was simply treating Mr. Bodenstein as a non-attorney intermediary between

Excerpt From Transcript

Mr. Stern and Mr. Bender. That is a little hard to answer because I do not think the participants in this conversation had it that well sorted out. The one thing I am certain of, and this is the keystone of my holding, is that the discussion of the problem about the bonds commencing on page 3, commencing with the initial part which I am suppressing, that leads immediately into a discussion of going to Mr. Bender for legal advice.

If it had led some other direction, if it had led into discussions with some machinations between Mr. Stern and Mr. Bodenstein, we would have an entirely different (308) picture. But this discussion of the bonds leads directly and immediately into the discussion of going to Mr. Bender. So one thing I am certain of is that the conversation beginning at the point where I have started the suppression relates to going to Mr. Bender for legal advice, and there is no contention that there would not be a proper bonafide attorney-client relationship between Mr. Stern and Mr. Bender. As to Mr. Bodenstein's precise role, was he also a lawyer? Was it a situation where there was consultation with him as a lawyer, wherein he then helped to arrange consultation with another lawyer, or was it a situation where Mr. Bodenstein must be deemed to be a non-lawyer simply acting as a non-lawyer agent or intermediary?

Mr. Stern has testified that he was regarding Mr. Bodenstein as a lawyer for the purpose of this discussion and other discussions at this period of time.

Mr. Bodenstein has testified that he was not regarding himself as a lawyer, so we have a direct conflict of the evidence.

Of course, Mr. Bodenstein was in fact a lawyer and the subject which we get into after the initial portion of the tape is the obtaining of legal advice. And at the end there is the statement by Mr. Stern, at the bottom of page 12, "I'm turning in desperation for some advice, because I am much afraid of talking and much afraid. The (309) only one I really consulted that knows the whole—blank—thing, you know is you."

Excerpt From Transcript

This would be consistent with Mr. Stern's testimony that he did indeed regard Mr. Bodenstein, at least in this conversation, as his lawyer, and intended to surround that conversation with the attorney-client privilege. I think Mr. Stern's testimony is exaggerated in that I think at this time there were conversations which were outside the attorney-client relationship, but I do not think it is a total mistake, and I think that Mr. Stern is partly right and partly wrong.

There is another part of the conversation which bears on the question of whether Mr. Bodenstein should be regarded as an attorney being consulted by Mr. Stern.

Mr. Grunewald: It is right above it, your Honor, I believe, the same page.

The Court: Mr. Bodenstein said something about, "I think I know the answer as a lawyer, but I'm not the pro in this area."

This would be consistent with the idea of Mr. Bodenstein being an attorney in this conversation who is referring Mr. Stern to another attorney. I wouldn't even claim that the matter is free from doubt, but I think that we don't have to reduce the matter to artificial categories, (310) the fact is that Mr. Bodenstein, among the other things he did, was an attorney. And he was known to Mr. Stern to be an attorney. And therefore, it seems to me natural and realistic to believe that Mr. Stern had that in mind in his discussions and that this played a part in his being willing to disclose what I did to Mr. Bodenstein, and it played a part in the revelation of information to Mr. Bodenstein which Mr. Bodenstein was going to convey to Mr. Bender.

Therefore, I would hold, although the matter is not completely clear cut, I think the weight of the evidence is that in this conversation Mr. Stern was speaking to Mr. Bodenstein as an attorney, but I would say this, that if I am wrong on that, and if Mr. Bodenstein is similarly an intermediary, then I would feel that the attorney-client

Excerpt From Transcript

privilege should be preserved because if a person wishes to employ an agent to communicate with an attorney, I see no reason in the world why that shouldn't be done and that communications with the agent intended for transmittal to the attorney, I see no reason in the world why that should not be privileged.

The more I think of it and the more I talk of it—and the talk has to end—it does seem to me clear that Mr. Bodenstein was more than merely an intermediary. The confidences would not have been given to him, it seems to (311) me, without the belief on the part of Mr. Stern that he was giving them to someone who could have the judgments that are associated with attorneys.

So I think my first alternative holding on this that I have just talked about, I would stick to. We have had a long discussion and that is the ruling.

Now, we come to the question of what to do about the trial. I certainly see that the Government has the statutory right to appeal this ruling upon a certification by the United States attorney to this Court that the appeal is not taken for the purpose of delay and that evidence is a substantial proof of a fact material in the proceeding. I would not for one minute assume there was a purpose of delay. I really, though, question the proposition that the matter is so substantial that we have to delay this trial. I just don't quite see that.

Do you want to take a position on that now? Are you applying for adjournment of trial or do you want to let this matter wait or what do you want to do?

Mr. Aronwald: Your Honor, we can let it wait until Thursday and I will certainly confer with Mr. Curran. However, I'd suggest to the Court that based on preliminary discussions I have had with members of the staff, they seem to be in agreement with me, and the case law says that I * * *

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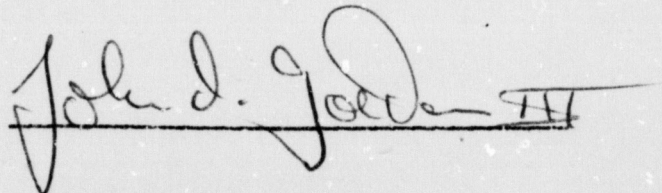
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) ss.:
COUNTY OF NEW YORK)

JOHN D. GORDAN III being duly sworn,
deposes and says that he is employed in the office of
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of New York.

That on the 12th day of December, 1974
he served 2 copies of the within brief by placing the
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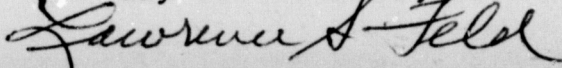
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Sworn to before me this

12th day of December, 1974



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